Supreme Court, U.S.
F I L E D

No. 98 916 DEC 2 1998

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In The

Supreme Court of the United States

October Term, 1998

ALLISON DEAS,

Petitioner,

v.

RIVER WEST, L.P.; ALTERNATIVE ADDICTION TREATMENT CONCEPTS, INC.; and STROTHER P. LINDSEY-DIXON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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102 pp

QUESTIONS PRESENTED

An employer regarded an employee as suffering from a seizure disorder, characterized by recurrent, *petit mal* seizures which were "not under good control" in the employer's opinion. The employer then terminated the employee as a result of this perception.

1. Does an employee whose employer regards her as suffering from recurrent seizures which are "not under good control" meet the statutory definition of an individual with a disability?

2. Did the lower courts err by requiring the employee to prove that her employer subjectively perceived the seizure disorder to be substantially limiting of a major life activity in order to defeat summary judgment?

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OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit issued its opinion on September 3, 1998. A copy of the opinion is included in Appendix (1), and the judgment is included in Appendix (51). The United States District Court for the Middle District of Louisiana issued a written ruling on cross-motions for summary judgment on January 28, 1997, and ordered the dismissal of the plaintiff's claims on February 6, 1997. Copies of the judgment and ruling are printed in Appendix (25) and Appendix (26).

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its opinion on September 3, 1998. This Petition for Writ of Certiorari is being filed within 90 days of the issuance of that opinion. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1254(1)

Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case; before or after rendition of judgment or decree;

"The Americans with Disabilities Act," 42 U.S.C. §§ 12101-12113 .....Appendix 53

29 C.F.R. § 1630.2(j)(3)(i)

> (3) With respect to the major life activity of working –
>
> > (i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

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STATEMENT OF THE CASE

On June 21, 1993, plaintiff, Allison Deas, applied for work as an addiction technician in a substance abuse program at River West Medical Center in Plaquemine, Louisiana. Defendant River West contracted with defendant AATC to operate the pilot substance abuse program, known as Strivers. The plaintiff was interviewed on June 23, 1993, then approved for hire on July 13, 1993, by the program director, Dr. Strother P. Lindsey-Dixon. The Strivers unit at River West was not yet operational at the time its initial staff, including the plaintiff, were hired.

On the date of her hire, the plaintiff responded to a mandatory health history survey, administered by River West nurse Elizabeth Pelham, in response to which Ms. Deas disclosed that she had suffered from "epilepsy (fits,

seizures)." The plaintiff also verbally informed Nurse Pelham that her seizures were successfully controlled by medication.

The plaintiff began her employment in the Strivers unit on July 29, 1993. Ms. Deas participated in a series of orientation programs for new employees, including an August 9, 1993 lecture conducted by Dr. Dixon. According to Dr. Dixon, the plaintiff appeared to suffer a *petit mal* seizure in the middle of this lecture, which lasted approximately forty-five seconds. Dr. Dixon testified that the plaintiff turned her head to the side and was unresponsive to her name being called during this time of the alleged seizure. Dr. Dixon also testified that she had been informed by a staff member of another *petit mal* seizure which the plaintiff had allegedly suffered in similar fashion earlier that same date. There was also testimony from Dr. Dixon that on the same date of August 9, 1993, she had heard that Ms. Deas had a seizure disorder and was receiving medical treatment. Dr. Dixon made the decision that day to terminate the plaintiff's employment.

On August 13, 1993, Dr. Dixon and River West employee Peggy Jarreau Miller personally informed the plaintiff that she was being terminated because of her "seizures." According to the plaintiff, Dr. Dixon and Ms. Miller stated that they had been unable to find another job within the hospital where Ms. Deas' medical condition could be accommodated.

The plaintiff made a formal complaint of employment discrimination to the U.S. Equal Employment Opportunity Commission, and filed suit against River West, L.P., d/b/a River West Medical Center, Alternative

Addiction Treatment Concepts, Inc., Dr. Strother P. Lindsey-Dixon, and Peggy Jarreau Miller.[1] The plaintiff alleged, *inter alia*, that she was terminated in violation of the Americans with Disabilities Act, because she was perceived to have a disability.

The U.S. District Court for the Middle District of Louisiana heard summary judgment motions on behalf of the plaintiff and all three defendants in 1997. In his written ruling of January 28, 1997, the magistrate judge[2] decided as follows: (1) partial summary judgment was granted in favor of the plaintiff upon finding that defendants River West and AATC both maintained an employment relationship with the plaintiff; (2) summary judgment was granted in favor of defendant Dixon on the grounds that she could not be held individually liable under the ADA; and (3) summary judgment was granted in favor of defendants River West and AATC on the issue of the plaintiff's status as an "individual with a disability" under the ADA. (Appendix 26).

The plaintiff's suit was dismissed by order of the magistrate judge on February 6, 1997 (Appendix 25), and the plaintiff appealed to the United States Court of Appeals for the Fifth Circuit. Defendant River West filed a cross-appeal of the district court's ruling on the issue of its employer status. After oral argument, the Court of Appeals affirmed the summary judgment ruling that Ms.

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[1] Ms. Miller was later dismissed from the suit without prejudice upon motion of the plaintiff.

[2] The parties consented in 1995 to adjudication of this matter by Magistrate Judge Stephen C. Riedlinger.

Deas was not "disabled" for purposes of the ADA.[3] The decision of the Court of Appeals was filed September 3, 1998 (Appendix 51).

ARGUMENT FOR GRANTING WRIT

The plaintiff in this suit was fired from her job because her employer believed that she suffered from epileptic-type seizures which were "not under good control." The defendants were granted summary judgment after arguing that the plaintiff was not regarded as an "individual with a disability" as defined by the Americans with Disabilities Act (ADA). The lower courts' ruling, which conflicts with decisions of other state and federal courts on parallel issues, marks a substantial setback for individuals such as Ms. Deas – victims of misapprehension and fear about disabilities – whom the ADA was designed to protect. This Court is respectfully urged to consider the significant plight of such individuals, who have been wrongfully deterred from employment opportunities as the result of common and general nescience within our society of epilepsy and seizures.

ARGUMENT I

The lower courts erroneously held that, as a matter of law, the plaintiff's employer did not regard her as an "individual with a disability" under the Americans with

[3] The appellate court pretermitted ruling on the issue of the employment status of River West.

Disabilities Act ("ADA"). For purposes of determining the applicability of the ADA, an employee who was perceived as suffering from recurrent seizures and terminated as a direct result of that perception should be treated as an employee who was regarded by her employer as disabled *per se*. Consistent with Congress' intent, this premise serves only to protect those individuals who needlessly face discrimination on account of persistent misconceptions about seizures and epilepsy.

Seizure disorders have long been the subject of alarming myths and stereotypes. Much of the misunderstanding of seizures can be attributed to the complexity of their underlying medical causes, and the variety of outward manifestations of different types of seizures. Witnesses to a seizure who are unfamiliar with epilepsy are often frightened by the experience. In a 1981 case discussing the myriad of school problems faced by children with epilepsy, a federal district court spotlighted a physician's testimony that "an epileptic child's biggest problem is not the malady itself, but the ignorance regarding epilepsy that pervades the community." *Akers v. Bolton*, 531 F. Supp. 300 (D. Kan. 1981).

Fortunately, the ADA was designed to protect not only those persons actually afflicted with disabling conditions, but also individuals who are merely perceived as handicapped. Whether or not a person actually suffers from a debilitating medical condition, that person may nevertheless face discrimination simply as a result of others' beliefs about his capability of "normal" functioning. The "disability" which is cognizable under the ADA

is the effect of the widespread misconception that a person with seizures is substantially limited. This misconception is largely attributable to a lack of awareness as to the causes of seizures, as well as the historically negative treatment which our society has shown toward persons with seizure disorders.

Understandably, our courts have been reluctant to classify any particular impairment as *per se* disabling in the context of ADA litigation. Perception cases, however, like the instant one, present a unique circumstance in which the plaintiff should be afforded greater protection against discrimination that stems from subjective, perfunctory, and often faulty observations of another.

At present, our jurisprudence has allowed a loophole which has the effect of enabling legal discrimination in employment against qualified employees who may or may not suffer from an actual seizure disorder. The plaintiff in this case, Allison Deas, fell prey to that loophole when the lower courts held that her perceived seizure disorder was not "an impairment which substantially limited a major life activity" under the ADA.

Dr. Dixon, the director of the substance abuse unit where the plaintiff worked, believed that Ms. Deas had suffered two *petit mal* seizures on the job during the course of one day. Without undertaking any further inquiry of the plaintiff's purported epileptic condition, Dr. Dixon quickly decided that Ms. Deas must be terminated, concluding that her seizures were not in "good control." When the plaintiff filed suit, the employer was granted summary judgment by arguing that Ms. Deas'

seizures were not regarded as a disability which would be covered under the Act.

Thus, the employer in this case has been allowed to legally discriminate against Ms. Deas by assuming, without any investigation, that the plaintiff suffers from a medical disorder which renders her incapable of performing her job duties, but contemporaneously insisting that such medical disorder could not possibly rise to the level of a disabling condition. This is an absurd manipulation of the remedial provisions of the ADA.

If Ms. Deas had claimed that she was fired from her job as an addiction technician because she actually suffers from the impairment of epilepsy, then the focal point of this case would likely have been whether or not the plaintiff was "otherwise qualified" to be an addiction technician, in spite of her epilepsy. Consider, for instance, those cases in which epileptic seizures have been treated as either "disabilities" under the ADA or "handicaps" under the Rehabilitation Act, allowing the merits of the plaintiff's discrimination claim to be heard: *Martinson v. Kinney Shoe Corporation*, 104 F.3d 683, 686 (4th Cir. 1997); *Reynolds v. Brock*, 815 F.2d 571, 574 (9th Cir. 1987); *Moses v. American Nonwovens, Inc.*, 97 F.3d 446 (11th Cir. 1996); *Mantolete v. Bolger*, 767 F.2d 1416 (9th Cir. 1985); *Eckles v. Consolidated Rail Corporation*, 890 F. Supp. 1391, 1398-1399 (S.D. Ind. 1995), *affirmed*, 94 F.3d 1041 (7th Cir. 1996); *Vasquez v. Bedsole*, 888 F. Supp. 727 (E.D. N.C. 1995); *Susie v. Apple Tree Pre-School and Child Care Center, Inc.*, 866 F. Supp. 390 (N.D. Iowa 1994). However, since the plaintiff alleges only that she was *perceived* as suffering from seizures, the defendants insist that the ADA should not

provide a remedy for her, because *petit mal* seizures cannot be disabling. Such a "loophole" in the definition of an "individual with a disability" defeats the clear purposes of the ADA.

The case sub judice is not the first to recognize this unfortunate loophole. In *EEOC v. Texas Bus Lines*, 923 F. Supp. 965 (S.D. Tex. 1996), an obese woman, Arazella Manuel, was denied employment as a bus driver based upon a physician's opinion that Ms. Manuel might be hindered in her ability "to move swiftly in the event of an accident." Ruling on cross-motions for summary judgment, the district court considered the Interpretative Guidance on Title I of the Americans With Disabilities Act, 29 C.F.R. Pt. 1630 appx. § 1630.2(l), in deciding that the "regarded as" prong of the ADA's definition of disability may be satisfied if the employee can prove that she was discriminated against on the basis of some "myth, fear or stereotype" about her perceived disability. The court took note of the ignorance that surrounded the employment decision:

> "Dr. Frierson's conclusion that Manuel would not move around swiftly in case of an accident was clearly not a medical opinion and was not based upon any medical tests or findings. To the contrary, Dr. Frierson admitted his failure to conduct agility tests to affirm his subjective beliefs that Manuel would not be able to move about swiftly. He did nothing to rule out the possibility that Manuel had simply decided to walk slowly because she had grown tired of sitting in the waiting room, or because her foot had fallen asleep, or some other temporary, non-impairing reason."

* * *

> "Texas Bus Lines regarded Manuel as disabled and, therefore, unable to work as a driver based on her alleged impaired mobility without the benefit of objective medical testing or findings. Texas Bus Lines' blind reliance on a very limited medical examination of Manuel by Dr. Frierson is misplaced and cannot be used as a justification to circumvent the anti-discrimination mandate of the ADA." *Id.* at 978.

In the case at bar, Dr. Dixon's decision to terminate the plaintiff was similarly based upon insufficient information. Despite Dr. Dixon's medical expertise, she neglected to perform any medical assessment of the plaintiff's apparent condition. Her conclusions, like Dr. Frierson's, were based upon mere subjective observations. The possibility that Ms. Deas was merely daydreaming cannot be ruled out, in light of Dr. Dixon's failure to conduct any scientific inquiry. Clearly, Ms. Deas was regarded as disabled by her employer.

Furthermore, when the employer can rely on such unfounded assumptions about a perceived impairment to defeat liability under the ADA, the plaintiff-employee rarely has the opportunity to argue the merits of the discrimination case. A similar phenomenon was identified by the First Circuit in *Arnold v. United Parcel Service*, 136 F.3d 854 (1st Cir. 1998). Arguing that an employee's diabetes, controlled by medication, did not substantially limit any major life activity, the employer, UPS, was granted summary judgment. The First Circuit reversed the decision, holding that the employee's diabetes must be considered without regard to mitigating measures. The

appellate court also noted that the "loophole" in the ADA's definition which was sought by UPS would produce a situation in which the jury could never entertain "the merits of the alleged discrimination, of the 'qualified individual' requirement, or of reasonable accommodation." *Id.* at 862.

This is precisely the type of short-circuiting of the ADA requirements which leaves injured plaintiffs such as Allison Deas without a remedy. It would be much more advantageous for our courts to allow a remedy under the ADA for capable individuals like Ms. Deas, who have been perceived as having epileptic seizures. Such a remedy, in the form of a more expansive application of the ADA's protection for individuals who are regarded as disabled, will not place the employer at any disadvantage; rather, it will abet Congress's clear intent, which the First Circuit recognized in *Arnold, supra*:

> "Conceptually, it seems more consistent with Congress's broad remedial goals in enacting the ADA, and it also makes more sense, to interpret the words 'individual with a disability' broadly, so the Act's coverage protects more types of people against discrimination. Even with such a broad view of 'disability,' the concerns and interests of employers are still amply protected through the Act's other provisions. For example, the individual with a disability who seeks a job must still be 'qualified,' i.e., able to perform the essential functions of the job." *Id.* At 862.

Unfortunately, without a broader interpretation of the "regarded as" prong of the ADA's definition of disability, employees perceived to be suffering from *petit mal* seizures will never have an opportunity to show that they

are qualified for the work they desire. This "trap" for individuals regarded as suffering from seizures is inescapable, as long as the employer can essentially argue that the employee is *too impaired* for the job, but *not impaired enough* to be protected by the statute. This Court is urged to consider the argument that individuals who are perceived by their employers as suffering from recurrent seizures are inherently regarded as having a disability for purposes of satisfying the ADA's definition of an individual with a disability.

ARGUMENT II

By means of this petition, this Honorable Court is urged to consider a more liberal application of the Americans with Disabilities Act for perception cases. The lower courts in this case have erred by requiring the plaintiff to prove that her employer subjectively perceived her seizure disorder to be substantially limiting of a major life activity in order to defeat summary judgment.

In a perception case such as this one, the plaintiff must first establish that she is an "individual with a disability" for purposes of ADA liability. *Bridges v. City of Bossier*, 92 F.3d 329 (5th Cir. 1996). The plaintiff may satisfy this threshold requirement by showing that the employer "regarded" her as having an impairment that substantially limits a major life activity. 42 U.S.C. § 12102(2)(C) (Appendix 56). With guidance from the EEOC, the courts have held that three scenarios will satisfy the ADA's definition of an individual who is regarded as having a substantially limiting impairment:

(1) an employee has an impairment which is not substantially limiting in reality, but which is perceived by the employer as substantially limiting; (2) an employee has an impairment which is not substantially limiting except for the attitudes of others toward the impairment; or (3) an employee has no impairment in reality, but is regarded by the employer as having a substantially limiting impairment. *Bridges, supra* at 332.

With reference to these interpretative guidelines from the EEOC,[4] the Fifth Circuit characterized Ms. Deas as claiming to suffer from "an impairment which is not substantially limiting but which the employer perceives as constituting a substantially limiting impairment." The Fifth Circuit failed to consider Ms. Deas' claims in terms of the second aforementioned scenario, that the attitudes of others (namely, Dr. Dixon) toward Ms. Deas' apparent seizure disorder resulted in a substantial limitation.

Thus, the court's analysis focused exclusively on the question of whether the plaintiff produced sufficient evidence that Dr. Dixon perceived her seizure disorder to be "substantially limiting." Citing decisions from the Second and Third Circuits, the Fifth Circuit held that Ms. Deas failed to satisfy the following burden:

> "Deas must have produced sufficient evidence for a reasonable trier of fact to conclude that Dr. Dixon perceived her as having an 'impairment'

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[4] In the past three years of ADA decisions, there has been little agreement among the United States Courts of Appeals as to whether the EEOC's interpretative guidelines are to be accepted by the courts.

> and that this impairment, if it existed as perceived by Dr. Dixon, would have substantially limited one or more of Deas' major life activities." *Deas v. River West, L.P.*, 152 F.3d 471, 476 (5th Cir. 1998), citing *Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 143 (3rd Cir. 1998) (en banc) and *Francis v. City of Meriden*, 129 F.3d 281, 285 (2nd Cir. 1997). (Appendix 8).

Plaintiff attempted to satisfy this burden by presenting competent evidence that Dr. Dixon, the director of the substance abuse unit where the plaintiff worked, regarded the plaintiff's seizures as substantially limiting her in one or more of the following major life activities: seeing, hearing, speaking, and/or working. Nevertheless, the lower courts accepted the affidavit testimony of Dr. Dixon that she did not regard the plaintiff as substantially limited in any major life activity because of her seizure disorder.

In light of Dr. Dixon's deposition testimony, reasonable minds could find that the plaintiff was regarded as substantially limited in the major life activities of seeing, hearing, and speaking. Dr. Dixon believed that Ms. Deas had suffered two *petit mal* seizures on the job during the course of one day. The manifestations of the plaintiff's alleged seizures were described by Dr. Dixon as follows:

> "I was lecturing and I saw [Deas'] head turn around very automated and it stayed, and her face was blank. And I called her name, and she did not move. . . . I continued to lecture and I continued to watch her; and after several seconds her head came back around, but she had a blank look on her face. And I called her name,

> and I asked her was she all right. And she said she was." (Appendix 3)

Dr. Dixon unambiguously testified that for a period of several seconds during an alleged seizure, the plaintiff was verbally unresponsive and motionless. The plaintiff presented sufficient evidence, in the form of Dr. Dixon's own deposition testimony, that Ms. Deas was regarded as unable to see, hear or speak during a seizure.

Indeed, the Fifth Circuit acknowledged that the plaintiff's apparent *petit mal* seizure did cause an interruption in her ability to see, hear or speak:

> "Although it is uncontrovertible [sic] that a seizure which causes a temporary loss of awareness briefly 'limits' an individual's ability to see, hear and speak, it is far from clear that all such seizures have the effect of substantially limiting these major life activities. . . . We do not doubt that in many cases epilepsy or a general seizure disorder will substantially limit one or more major activities." (Appendix 16)

While the court refused the suggestion that *all* seizures will result in a substantial limitation upon one's ability to see, hear or speak, the Fifth Circuit failed to recognize that the particular seizures which Dr. Dixon described and attributed to the plaintiff were substantially limiting.

Analogizing this case to others in which plaintiffs were only "partially" disabled, and reasoning that Ms. Deas was only hindered in her ability to see, hear or speak for a matter of seconds, the Fifth Circuit has held that the plaintiff's perceived seizure disorder did not amount to a "substantial limitation." *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50, 52 (5th Cir. 1997); *Robinson v.*

Global Marine Drilling Co., 101 F.3d 35, 37 (5th Cir. 1996); *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 & n.11 (5th Cir. 1995); and *Rogers v. International Marine Terminals, Inc.*, 87 F.3d 755, 759 (5th Cir. 1996). However, the plaintiff contends that the lower courts have erred by confusing the degree of impairment *perceived* by Dr. Dixon and the degree of any *actual* impairment suffered by Ms. Deas.

In all of the cases cited by the Fifth Circuit for its conclusion that Ms. Deas' ability to see, hear and speak was only partially limited, the court's analysis centered around actual impairments suffered by the plaintiffs, *e.g.*, blindness in one eye, fifty percent loss of lung capacity, injury to one arm. In the case at bar, however, the determination of whether the plaintiff's seizures were "substantially limiting" must be considered from the perspective of Dr. Dixon – not from any evidence of the plaintiff's actual ability to function. The *Still* case, for instance, is certainly distinguishable because it was the employee – not his employer – who perceived that a particular job was too dangerous in light of his limited eyesight. By contrast, in the instant case, Ms. Deas never considered herself disabled; rather, her employer treated her as disabled and felt that the job of addiction technician was too dangerous for an epileptic.

Although the plaintiff does not consider herself to be disabled and introduced no medical evidence to the contrary, Ms. Deas may still show that she was regarded by her employer as substantially limited in a major life activity. Thus, it is the testimony of Dr. Dixon, who made the decision to terminate the plaintiff, which is critical to a summary judgment determination and which should

have been more carefully considered by the lower courts. According to Dr. Dixon's testimony, the plaintiff suffered a loss of awareness for approximately forty-five seconds during an apparent seizure; during that time, Dr. Dixon perceived that the plaintiff was unable to hear or speak. This perceived inability to function was the sole impetus for the plaintiff's termination.

In holding that Ms. Deas was not substantially limited in major life activities of seeing, hearing or speaking, the lower courts have also overemphasized the fact that Ms. Deas' purported seizures were brief in duration. The Fifth Circuit concluded that the brief seizure episode allegedly witnessed by Dr. Dixon was not "a 'significant restriction' as to 'the condition, manner, or duration' under which Deas could see, hear, and speak." Insofar as there is no precise legal definition of "significant restriction" for our courts to apply, the plaintiff maintains that there was sufficient evidence in the record that Dr. Dixon did, in fact, regard her as being significantly restricted so as to preclude her continued employment in the substance abuse unit. The evidence showed that Dr. Dixon was primarily concerned that in the event of a seizure, the plaintiff would be unable to see, hear, or speak to patients and co-workers in the unit; obviously, Dr. Dixon viewed this restriction as significant, as it drove her decision to terminate Ms. Deas.

Additionally, the Fifth Circuit's finding that the plaintiff's alleged seizures were not a "significant restriction" of her ability to see, hear or speak, was erroneously based upon the mere examination of a single seizure episode, rather than a consideration of the underlying seizure disorder which was perceived by Dr. Dixon. If the

lower courts are to adopt the EEOC's interpretative guidance with respect to "condition, manner, or duration," then those factors must be applied to the perceived *impairment*, rather than to the mere *symptoms* of the impairment:

> "Whether an impairment substantially limits a major life activity depends on the following factors: (1) the nature and severity of the impairment, (2) the duration or expected duration of the impairment, and (3) the permanent or expected long term impact. See 29 C.F.R. § 1630.2(j)(2)." *Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1119 (5th Cir. 1998).

The evidence in the instant case suggests that Dr. Dixon was more concerned with long-term risks posed by the plaintiff if she continued to work in the substance abuse unit while suffering from a seizure disorder. The decision to terminate Ms. Deas was not the result of one seizure episode being witnessed, but rather the consequence of Dr. Dixon's perception that the plaintiff's recurring seizures were not under control.

Moreover, the Fifth Circuit's narrow interpretation of "substantial limitation" is inconsistent with the remedial principles of the ADA and incongruous with the rulings of other courts facing similar issues. For instance, in *Marconi v. Guardian Mgmt. Corp.*, 149 Or. App. 541, 945 P.2d 86 (Or. Ct. App. 1997), the plaintiff's epileptic seizure episodes were described as nearly identical to the ones which Ms. Deas allegedly suffered in the presence of Dr. Dixon. Marconi's seizures would "last between 30 seconds and several minutes" and would routinely occur two or three times a day. Each seizure caused Marconi to

suffer a "blackout" in which she would momentarily lose "awareness." Marconi's suit alleged discrimination both on the basis of an actual disability and a perceived disability. The defendant conceded that Marconi did suffer from epilepsy and that epilepsy was an impairment for purposes of the statute; however, the defendant argued that Marconi's epilepsy did not substantially limit any major life activities. The appellate court disagreed:

> "It is undisputed that plaintiff blacks out during her seizures; at those times, she is unable to engage in ambulation, communication or socialization. . . . Thus, the trial court's ruling appears to have been based on the relatively short duration of each individual seizure. We disagree with the trial court's conclusion that, because the epileptic seizures described in this record are relatively short in duration, they do not 'substantially limit' major life activities."

Similarly, in the instant case, the plaintiff should not be barred from pursuing an employment discrimination claim on its merits, simply because her perceived impairment did not manifest itself for any lengthy period of time. This improper exegesis of the statute by the Fifth Circuit has prejudiced the plaintiff in her ability to defend against summary judgment.

The lower courts also decided, as a matter of law, that Dr. Dixon did not perceive the plaintiff's seizure disorder as substantially limiting her in the major life activity of working. There is no question in this case that the plaintiff was fired because she was perceived to suffer from seizures which were not adequately controlled, in the opinion of her employer. In light of this undisputed

fact, summary judgment was improper, and the question of whether the plaintiff was regarded as substantially limited in her ability to work should have been left to the trier of fact.

This is not a case in which the plaintiff was regarded as "unable to perform one task with an adequate safety margin." *Chandler v. City of Dallas*, 2 F.3d 1385 (5th Cir. 1993). Instead, the plaintiff's employer, Dr. Dixon, has regarded her as substantially limited in her ability to work by treating her as suffering from an impairment – seizures – which would "foreclose generally the type of employment involved." *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986).

Although Dr. Dixon later testified that the plaintiff would be suited for work as a receptionist, there was, nevertheless, evidence that at the time of Ms. Deas' termination, Dr. Dixon regarded the plaintiff as unable to work at any job in the hospital. Hospital employment clearly encompasses a wide spectrum of employment opportunities, including positions for doctors, nurses, technicians, administrators, secretaries, receptionists, clerks, housekeepers, dieticians, librarians, maintenance workers, and social service workers. According to the plaintiff's testimony, she was not allowed to work at *any* job within the hospital because of her seizure disorder.

This evidence, that Ms. Deas was refused employment in the hospital altogether, was sufficient to raise a genuine issue of material fact with respect to the number/type of jobs from which the plaintiff was excluded. In fact, the Fifth Circuit acknowledged the weight of this evidence:

> "It appears, however, that, when viewed in a light most favorable to Deas, the summary judgment evidence is sufficient that a reasonable trier of fact could conclude that Dr. Dixon regarded Deas as unable to perform more than just the single job of 'addiction technician.' " (Appendix 23)

The Fifth Circuit nevertheless held that summary judgment was proper, upon finding that the plaintiff was not discriminated against with respect to "a broad range of jobs." However, the plaintiff maintains that this was a question of fact not susceptible to summary judgment.

Furthermore, the rationale behind Dr. Dixon's decision to terminate the plaintiff from her job in the Strivers Unit is strong evidence that the plaintiff was regarded as unsuitable for a class of jobs, rather than for the single job of addiction technician.

> "If the rationale proffered by an employer in the context of a single refusal to hire adequately evinces that the employer treats a particular condition as a disqualifier for a wide range of employment opportunities, proof of a far-flung pattern of rejections may not be necessary. Put in slightly more concrete terms, denying an applicant even a single job that requires no unique physical skills, due solely to the perception that the applicant suffers from a physical limitations [sic] that would keep her from qualifying for a broad spectrum of jobs, can constitute treating an applicant as if her condition substantially limited a major life activity, viz., working." *Cook v. State of Rhode Island, Dept. Of Mental Health, Retardation, and Hospitals*, 10 F.3d 17, 26 (1st Cir. 1993).

All of Dr. Dixon's fear about the plaintiff's abilities was related to imaginable future exigencies on the job. Dr. Dixon perceived that the plaintiff would create risks for herself, her co-workers, and the substance abuse unit's patients, if she continued to work with her purported seizure disorder. According to Dr. Dixon, the plaintiff's seizures placed her at greater risk of being sexually assaulted by a patient. Dr. Dixon also worried that during the course of a seizure, the plaintiff would be incapable of either assisting or summoning assistance for patients in need.

These specific concerns admitted by Dr. Dixon do not merely preclude the plaintiff from working as an addiction technician in the Strivers Unit, but also illustrate Dr. Dixon's reluctance to employ the plaintiff in any capacity within her chosen field. Plaintiff holds an undergraduate degree in psychology. In barring the plaintiff from working with any high-risk patients, the defendants have shown an intent to exclude Ms. Deas from working in the field of psychology. This is clearly a restriction from an entire "class of jobs." 29 C.F.R. § 1630.2(j)(3)(i).

The plaintiff was terminated by Dr. Dixon without even a minimal inquiry into her actual medical condition and her real abilities to handle the addiction technician position. Dr. Dixon made the cursory decision to terminate Ms. Deas, concluding that she was a direct threat. The viability of the direct threat defense, however, must be subject to a determination by the finder of fact. *Rizzo v. Children's World Learning Centers, Inc.*, 84 F.3d 758, 764 (5th Cir. 1996). In this case, the lower courts have erred by allowing evidence that is relevant to the "direct threat" issue to determine summary judgment on the

issue of the plaintiff's status as an individual who is substantially limited in her ability to work.

Arguably, the possibility exists that a jury could find Ms. Deas poses a direct threat by working as an addiction Technician at the Strivers Unit. However, the trier of fact is unable to reach such a determination, nor the "reasonable accommodation" issue, unless the plaintiff first meets the threshold requirement of satisfying the ADA's definition of an "individual with a disability." The defendants' argument that Ms. Deas was at risk of hurting herself or others was improperly considered for purposes of whether the plaintiff was "regarded as" disabled as a matter of law.

The plaintiff's case presents two distinct questions: first, is the plaintiff an "individual with a disability" as defined by the ADA; and second, was the plaintiff "otherwise qualified" for the position of addiction technician? The lower courts have improperly confused these two inquiries by reviewing the plaintiff's qualifications for the particular job of addiction technician in their assessment of whether the plaintiff was regarded as substantially limited in the major life activity of working. It is incumbent, especially in the context of summary judgment rulings, that these two elements of the employment discrimination claim receive an individualized assessment.

In light of the testimony presented, the plaintiff raised a genuine issue of material fact as to whether she was denied employment solely as an addiction technician, or denied employment within the hospital in its entirety. Therefore, summary judgment was improper as

to the issue of whether the plaintiff was regarded as substantially limited in the major life activity of working.

More importantly, the lower courts failed to consider the discriminatory motive that was inherent in Dr. Dixon's decision to terminate the plaintiff. Ms. Deas was perceived as having uncontrolled seizures, and Dr. Dixon concluded that her termination was necessary because of those seizures. It is clear that Dr. Dixon's attitude toward the plaintiff's perceived seizure disorder, resulted in a substantial limitation for Ms. Deas.

Dr. Dixon's perceptions were viewed by the lower courts as critical to an evaluation of the plaintiff's claims under the "regarded as" prong of the ADA. The Fifth Circuit appropriately stated, "Dr. Dixon is the relevant decisionmaker in the case at bar, and our analysis focuses on how she perceived, and acted toward, Deas." However, the court's ultimate decision appears to have been based upon considerations beyond the perceptions of Dr. Dixon. A prime example is the weight which the appellate court improperly afforded to evidence of the plaintiff's actual abilities and medical condition. Rather than limiting its focus to Dr. Dixon's perceptions about the plaintiff's medical status at the time of her discharge, the courts scrutinized the evidence and testimony presented which relates to the plaintiff's actual degree of impairment. The plaintiff's ability to function without limitation in *reality* is of no consequence in this type of perception case, when it is the employer's beliefs at the time of discharge which must be reviewed.

In this case, had the lower courts focused their attention solely on the perceptions of Dr. Dixon, the plaintiff's

burden would be to show that her employer regarded her as an individual with a disability. Insofar as the ADA has not further defined the "regarded as" prong of the definition, our courts have been charged with the task of interpreting the statute appropriately. As an unfortunate result, some federal circuits hold plaintiffs in perception cases to an unrealistic standard, which has been demonstrated in the case at bar. The ultimate test, utilized by the Fifth Circuit, is for the plaintiff to prove the subjective perceptions of the employer.

This analysis is problematic for plaintiffs in all cases arising under the "regarded as" prong of the ADA, as it places too great an evidentiary burden on the aggrieved employee and necessarily tips the scales in favor of the employer. Under the current jurisprudence, any defendant employer may escape liability simply by asserting that the employee's perceived impairment was not "substantially limiting." The employee must then futilely attempt to rebut the employer's self-serving statements with contradictory evidence, if it even exists, of the employer's subjective perceptions.

Ms. Deas advances the argument herein that this extraordinary burden of proof required by the Fifth Circuit in perception cases is inconsistent with Congress' manifest intent for the liberal application of the ADA. Inherent in the statutory language is the choice to include mere perceptions of disability within the spectrum of discriminatory acts prohibited by the Act. In a perception case, where the adverse employment action has been so clearly based upon assumptions rather than facts, the statute simply does not warrant the courts' requirement

that the plaintiff produce further evidence of the defendant's state of mind.

When the evidence shows that the employee was regarded by her employer as suffering from recurrent *petit mal* seizures, symptomatic of a medical disorder, and that the perceived neurological disorder was the sole reason for the employee's discharge, the courts should allow a presumption in favor of the employee for purposes of meeting the statutory definition of an "individual with a disability."

The only reason offered for Ms. Deas' termination was Dr. Dixon's perception of her seizure disorder; the employer regarded the disorder as an insurmountable obstacle to the plaintiff's employment in the substance abuse unit. The fact of the plaintiff's termination, standing alone, is strong evidence of the employer's attitude toward Ms. Deas' perceived seizure disorder. This is precisely the type of discrimination which the "regarded as" prong of the ADA was designed to prevent.

The plaintiff produced evidence that her employer viewed her as unable to see, hear or speak during the course of a seizure, and incapable of working in a substance abuse unit. This evidence should overwhelmingly confirm that the employee was regarded as having an impairment that substantially limits one or more major life activities, but the lower courts have required more in order for the plaintiff to meet the threshold requirement of satisfying the ADA's definition of an individual with a disability. The consequence of this narrow interpretation of the Act is that it becomes nearly impossible for the

plaintiff in a perception case to defeat summary judgment on the issue of ADA coverage.

The lower courts' restrictive application of the "regarded as" prong of the ADA is causing a substantial prejudice against employees. The prejudice is being suffered by individuals who are denied employment and other opportunities on the mere basis of a perceived limitation. Insofar as these particular plaintiffs are among those whom Congress strove to protect by enacting the ADA, this Court is now strongly urged to address this prejudice.

CONCLUSION

Plaintiff, Allison Deas, was terminated from her employment as the result of her employer's perception that she suffered from recurrent *petit mal* seizures which were "not under good control." In spite of these undisputed facts, the trial court and the Fifth Circuit Court of Appeals ruled that there was insufficient evidence that the plaintiff's employer regarded her as an "individual with a disability" as contemplated by the ADA. In order to reach this conclusion and allow summary judgment for the defendants, the lower courts have engaged in a constricted analysis of the statutory definition of "disability" which was neither intended by Congress nor warranted by existing jurisprudence in similar cases. These decisions represent an alarming departure from Congress' intent, with the ADA, to eradicate the problem of discriminatory employment practices which often stem "from stereotypic assumptions not truly indicative of the

individual ability" of the person who is perceived as impaired. 42 U.S.C. § 12101(a)(7). (Appendix 54). The petitioner respectfully prays for the issuance of a Writ of Certiorari, in order to ensure that all of our courts will uphold the purposes of the ADA and provide consistent protection against discrimination on the basis of perceived medical disorders.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-30154

ALLISON DEAS,

Plaintiff-Appellant,
Cross-Appellee,

versus

RIVER WEST, L.P.; ET AL.,

Defendants,

ALTERNATIVE ADDICTION TREATMENT CONCEPTS, INC.; STROTHER P. LINDSEY-DIXON,

Defendants-Appellees,

RIVER WEST, L.P.,

Defendant-Appellee-
Cross-Appellant.

Appeals from the United States District Court for the Middle District of Louisiana

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(Filed Sep. 03, 1998)

Before POLITZ, Chief Judge, GARWOOD and BARKSDALE, Circuit Judges.

GARWOOD, Circuit Judge:

Plaintiff-appellant Allison Deas (Deas) appeals the grant of summary judgment in favor of defendants-appellees, contending that the court below erred in concluding

that she was not disabled under the Americans with Disabilities Act (ADA). 42 U.S.C. § 12101 *et seq.* We affirm.

Facts and Proceedings Below

Responding to a classified advertisement announcing job opportunities associated with the planned opening of a pilot substance abuse program by Alternative Addiction Treatment Concepts (AATC),[1] Deas applied for employment as an "Addiction Technician." During the application process, Deas filled out a health history questionnaire on which she disclosed that she had suffered

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[1] This case involves two separate business entities, both of which were named as defendants by Deas in her suit. Alternative Addiction Treatment Concepts, Inc. (AATC), a Louisiana corporation, gained permission of the Louisiana Department of Health and Hospitals to institute a pilot substance abuse program. River West, L.P., a Delaware limited partnership, operates a hospital facility (River West Medical Center) in Plaquemine, Louisiana. AATC and River West entered into a contractual agreement providing for the development of a substance abuse program to be housed at the River West Medical Center. In the court below, Deas argued that both AATC and River West were her "employers" for purposes of liability under the ADA. The magistrate judge ruled that both entities qualified as employers, and River West has cross-appealed this ruling. Because we find that Deas was not "disabled" within the meaning of the ADA, the cross-appeal is moot, and we do not address the employment issues argued in the court below. For simplicity sake, we assume *arguendo* that both AATC and River West qualified as Deas' employers under the ADA, and we refer to these employers collectively simply as AATC.

from "epilepsy (fits, seizures)" in the past.[2] She was subsequently interviewed by Dr. Strother P. Lindsey-Dixon (Dr. Dixon), medical director of the substance abuse program, and approved for hire by Dr. Dixon on July 13, 1993.

Deas commenced employment on July 29, 1993.[3] On August 9, 1993, during a staff lecture being conducted by Dr. Dixon, Deas appeared to suffer a *petit mal* or "absence" seizure during which she became verbally unresponsive and seemed to lose awareness of her surroundings for a brief time.[4] The seizure lasted only a few seconds, after which Dr. Dixon asked Deas if she was "all right." Deas responded that she was, and Dr. Dixon resumed the lecture with Deas in attendance.

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[2] Initially Deas alleged that the questionnaire violated the ADA's prohibition on preemployment medical inquiries. *See* 42 U.S.C. § 12112(d). This issue, however, has not been briefed on appeal and is not before this Court.

[3] Because the substance abuse program was not yet open, Deas' job initially consisted solely of participating in the employee orientation program.

[4] In her deposition, Dr. Dixon described the episode as follows:

> "I was lecturing and I saw [Deas'] head turn around very automated and it stayed, and her face was blank. And I called her name, and she did not move. . . . I continued to lecture and I continued to watch her; and after several seconds her head came back around, but she had a blank look on her face. And I called her name, and I asked her was she all right. And she said she was."

A few hours later, Dr. Dixon was approached by another AATC employee, Lane Douglas (Douglas), who told her that he had seen Deas have a seizure earlier in the day. According to Dr. Dixon, Douglas told her that he had been conversing with Deas when she suddenly appeared to lose all awareness of her surroundings and was verbally uncommunicative for several minutes. Upon recovering, Deas apparently seemed to be unaware that she had just suffered a seizure. When Douglas asked her about it, Deas responded that she had been diagnosed as having a seizure disorder, but did not acknowledge that she had just experienced one.

After learning that Deas had suffered two seizures in a single day, Dr. Dixon concluded that Deas' seizures were not well controlled and became concerned that Deas would not be able to safely and adequately fulfill her duties as an addiction technician. Soon thereafter, Dr. Dixon determined that Deas could not perform the functions of an addiction technician and accordingly made the decision to discharge her. On August 13, 1993, Dr. Dixon and Peggy Miller, River West's human resources director, met with Deas to inform her that she was being discharged from employment due to her seizures. According to Deas, she was told in her exit interview that she was being fired because of her seizures and that Miller and Dr. Dixon stated that they had "both looked for another job somewhere in the hospital that could accommodate her, but that they were unable to find one, and that therefore [she] was fired from the hospital altogether."

Deas commenced suit in Louisiana state court alleging, *inter alia*, that her discharge violated the ADA. Defendants subsequently removed the case to the United

States District Court for the Middle District of Louisiana, where, upon consent of the parties, the case was assigned to a magistrate judge under 28 U.S.C. § 636(c). Ruling on cross-motions for summary judgment, the magistrate judge granted summary judgment for defendants on the basis that Deas was not disabled under the ADA.[5] Deas brings this appeal.

Discussion

We review a grant of summary judgment applying the same standard as the court below. *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 725 (5th Cir. 1995). Summary judgment is proper when no issue of material fact exists and the moving party is entitled to judgment as a matter of law. Questions of fact are viewed in the light most favorable to the nonmovant and questions of law are reviewed *de novo*. *Id.*

Deas has never contended, here or below, that she is "actually" disabled. Rather, the essence of her claim, both in this Court and in the court below, is that her seizures do not substantially limit any major life activity, but that she was nevertheless regarded as disabled and discharged by Dr. Dixon on the basis of this misperception. Accordingly, Deas contends that she qualifies for the

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[5] The magistrate judge also ruled that both River West and AATC were Deas' "employers" under the ADA. As noted above, River West has filed a cross-appeal challenging this conclusion. Because we hold that Deas is not disabled within the meaning of the ADA, the issue is moot and we do not address it.

protections of the ADA under the "regarded as" prong of the statute's definition of "disability."[6]

Under the ADA, an individual may qualify as "disabled" if he or she is "regarded as" having an impairment that substantially limits one or more major life activities. *Bridges v. City of Bossier*, 92 F.3d 329, 332 (5th Cir. 1996). In its implementing regulations, the Equal Opportunity Employment Commission (EEOC) defines three general situations or contexts in which a plaintiff qualifies for the ADA's protection under the "regarded as" prong.[7] *See Dutcher*, 53 F.3d at 728 & n.19. We have summarized the EEOC guidance on this issue as follows:

> "One is regarded as having a substantially limiting impairment if the individual (1) has an impairment which is not substantially limiting but which the employer perceives as constituting a substantially limiting impairment; (2) has an impairment which is substantially limiting

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[6] The ADA defines "disability" in the alternative, providing that

> "[t]he term 'disability' means, with respect to an individual –
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2).

For lack of more eloquent terminology, we refer to subsection (C) as the "regarded as" prong of the definition, and we refer to a claim of disability pursuant to subsection (A) as an assertion of "actual" disability.

[7] *See* 29 C.F.R. § 1630.2(l)(1)-(3).

> only because of the attitudes of others toward such an impairment; or (3) has no impairment at all but is regarded by the employer as having a substantially limiting impairment." *Bridges*, 92 F.3d at 332.

As it is uncontested that Deas' seizures constitute an "impairment,"[8] this case involves the first of the three scenarios outlined above (*i.e.*, where an individual has an impairment that is erroneously perceived by the employer as a substantially limiting impairment). Because it is also uncontested that Dr. Dixon was the individual responsible for deciding to terminate Deas and that she did so "because of" the seizures, the question on this appeal boils down to whether Deas produced sufficient evidence for a reasonable trier of fact to find that Dr. Dixon perceived her seizures as constituting a substantially limiting impairment.[9] In other words, to have made

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[8] The ADA does not define the term "impairment," but the EEOC regulations provide that "physical or mental impairment" means:

> "(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or
>
> (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 29 C.F.R. § 1630.2(h)(1) & (2).

[9] Under the "regarded as" prong, the disability status of the plaintiff turns not on the plaintiff's physical condition, but rather on how the plaintiff was perceived and treated by those

a *prima facie* showing of disability, Deas must have produced sufficient evidence for a reasonable trier of fact to conclude that Dr. Dixon perceived her as having an "impairment" *and* that this impairment, if it existed as perceived by Dr. Dixon, would have substantially limited one or more of Deas' major life activities.[10]

Considered in the light most favorable to Deas, the summary judgment record clearly contains sufficient evidence to establish that Dr. Dixon regarded Deas as having

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individuals alleged to have taken discriminatory action. In the case at bar, the discriminatory act alleged on appeal is Deas' discharge from employment. The summary judgment evidence indicates that Dr. Dixon, acting in her capacity as the medical director of the substance abuse unit, made the decision to discharge Deas. Thus, the opinions or perceptions of other individuals involved are of little legal significance to Deas' claim. Dr. Dixon is the relevant decisionmaker in the case at bar, and our analysis focuses on how she perceived, and acted toward, Deas. *See Runnebaum v. NationsBank of Maryland*, 123 F.3d 156, 172 (4th Cir.1997) (analysis of "regarded as" claim "focuses on the reactions and perceptions of the relevant decisionmakers working with [the plaintiff]").

[10] *See, e.g., Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 143 (3d Cir.1998) (en banc) (analysis of a "regarded as" claim requires the court to determine whether defendant regarded plaintiff as having an impairment and whether the impairment, as perceived by the defendant, would have substantially limited one or more of plaintiff's major life activities); *cf. Francis v. City of Meriden*, 129 F.3d 281, 285 (2d Cir.1997) ("[P]laintiff must allege that the employer believed, however erroneously, that the plaintiff suffered from an 'impairment' that, if it truly existed, would be covered under the [ADA] and that the employer discriminated against the plaintiff on that basis.").

an impairment.[11] The more difficult question is whether Deas produced summary judgment evidence sufficient for a reasonable trier of fact to find that Dr. Dixon regarded Deas' seizures as substantially limiting a major life activity. Deas advances three separate arguments in this respect. We review each in turn.

I. Seizures as a Disability *Per Se*

In her first argument on appeal, Deas urges this Court to hold that "seizures" constitute a disability *per se* and, consequently, that because she was regarded as suffering from seizures she was automatically perceived as suffering from a substantially limiting impairment.[12]

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[11] The term "impairment" has consistently been defined to include physiological disorders affecting neurological body functions, specifically including epilepsy. Moreover, the EEOC's "Interpretive Guidance to Title I of the Americans with Disabilities Act," (hereinafter "Interpretive Guidance"), which is included as an appendix to the ADA implementing regulations, treats epilepsy as an impairment *per se*. 29 C.F.R. Pt. 1630.2(h), App. (1997).

Although the summary judgment record does not reflect that Dr. Dixon thought Deas suffered from epilepsy, Dr. Dixon's belief that Deas' seizures were not isolated incidents and her decision to discharge Deas without further inquiry into Deas' medical condition strongly indicate that Dr. Dixon perceived Deas' seizures as constituting a neurological disorder sufficient to qualify as an impairment.

[12] We note that there is some logical incongruity in Deas' argument. If seizures constitute a disability *per se*, then Deas would qualify as "disabled" under the first prong of the ADA definition and there is no need to resort to the "regarded as" prong. We also note that Deas' deposition testimony plainly reflects that she does not consider her seizures to be

Although she cites several cases as supporting her position, Deas relies primarily on *Martinson v. Kinney Shoe Corp.*, 104 F.3d 683 (4th Cir. 1997), asserting that in that case the "Fourth Circuit held that seizures are a disability *per se* under the ADA." Deas finds support for her position in a passage from the opinion which reads: "To fire for seizures is to fire for disability. Seizures are 'a mental or physical impairment that substantially limits one or more of [Martinson's] major life activities,' *i.e.*, a disability." *Martinson*, 104 F.3d at 686.

Although this language would appear to support Deas' position, when considered in context it becomes clear that Deas has misread the court's holding in *Martinson*. As is specifically noted in that opinion, the issue of the plaintiff's disability status was not before the court because the district court had assumed, for purposes of its ruling, that the plaintiff was disabled, and the defendant-appellee did not challenge this conclusion on appeal.[13] As it was not a contested issue, the court on

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substantially limiting. She testified that they do not interfere with her life in any way, except for limiting her in a few recreational activities. In light of Deas' testimony that her seizures do not pose any significant limitation whatsoever, and in the absence of any medical evidence to the contrary, we find the argument that seizures are invariably and inherently disabling is both contradicted by Deas' sworn testimony in this case and unsupported by any evidence in the record before us. In addition, Deas has provided no evidence of any severe societal prejudice against individuals who suffer from "seizures."

[13] As stated by the court, "[f]or purposes of summary judgment, the district court concluded that Martinson had a disability and thus the first prong of [his *prima facie* case] had

appeal did not address whether the plaintiff was disabled or whether seizures were a disability *per se*. The quoted language appears in a section of the opinion rejecting the district court's distinction between discharging an employee based on disability and discharging an employee due to the "physical manifestations" of that disability. Thus, *Martinson* neither discusses nor supports the proposition that seizures constitute a disability *per se*.[14]

The other cases relied on by Deas are equally unavailing. As the magistrate judge aptly concluded: "the cases cited by [Deas] are unpersuasive because they contain little or no analysis, assume for purposes of the

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been satisfied, a conclusion that [defendant-appellee] Kinney does not contest at this stage." *Martinson*, 104 F.3d at 686.

[14] Deas appears to have simply misread the holding of *Martinson*. An explanatory footnote which accompanies the language relied on by Deas states that: "Both a disease and its physical manifestations can constitute disabilities." *Martinson*, 104 F.3d at 686 n. 2. This clarification was needed because the district court there had distinguished between the "general disability" of epilepsy and its "specific attributes" (*i.e.*, seizures). The district court had reasoned that because the plaintiff had been fired due to the symptoms of the disability, rather than the disability itself, the plaintiff had failed to prove discrimination based on disability. *Id.* at 686. The Fourth Circuit corrected this error, clarifying that there is usually no legal distinction between discharging a disabled employee because of a disability and discharging an employee based on the characteristic or defining symptoms of that disability. Thus in *Martinson*, discharging the plaintiff based on his seizures was no different from discharging him due to his epilepsy. As it was uncontested that the plaintiff's epilepsy constituted a disability, the court concluded that, with respect to that plaintiff, "[t]o fire for seizures is to fire for a disability." *Id.*

ruling that epilepsy or seizures are disabling impairments, or merely rely upon cases that [similarly] have not analyzed the issue." In sum, none of the cases cited by Deas provides a persuasive rationale for recognizing either "seizures" or epilepsy as a disability *per se*.

Additionally, Deas makes no attempt to address the numerous decisions of this and other courts declining to recognize various impairments as disabilities *per se* and emphasizing the importance of, and rationale behind, making disability determinations on an individualized basis. *See Matczak v. Frankford Candy and Chocolate Co.*, 136 F.3d 933, 938 (3d Cir.1997) ("Some individuals suffer from relatively mild forms of epilepsy which cause nothing more than 'minor isolated muscle jerks' – so we cannot and do not conclude that all epileptics are substantially limited by the impairment."). *See also, e.g., Baert v. Euclid Beverage, Limited*, ___ F.3d ___, 1998 WL 381442 at *4 (7th Cir.1998) (insulin dependent diabetes is not a *per se* disability under the ADA); *Burch v. Coca-Cola Co.*, 119 F.3d 305, 316 (5th Cir.1997), *cert. denied*, 118 S.Ct. 871, (1998) ("Unlike HIV infection, the EEOC has not attempted to classify alcoholism as a per se disability, and we decline to adopt such a questionable position."); *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50, 52 (5th Cir.1997) (holding that blindness in one eye did not automatically constitute a disability); *Bridges v. City of Bossier*, 92 F.3d 329, 336 n. 11 (5th Cir.1996) (rejecting argument that hemophilia is a disability *per se*); and *Homeyer v. Stanley Tulchin Assocs., Inc.*, 91 F.3d 959, 962 (7th Cir.1996) ("A disability determination, however, should not be based on abstract lists or categories of impairments, as there are varying degrees

of impairments as well as varied individuals who suffer from the impairments.").

We have consistently emphasized that an individualized, case-by-case determination of disability best achieves the purposes of the ADA. As the EEOC states in its Interpretive Guidance, "[t]he determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual."[15] Deas provides us with no reason to depart from our general practice of determining disability status on a case-by-case basis, and we consequently decline to do so.

We note two additional weaknesses in Deas' argument. First, she has not provided any expert testimony or other evidence to support her position or its underlying premises.[16] Second, she does not offer any practical

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[15] 29 C.F.R. Pt. 1630.2(j), App. (1997). We also note that the Supreme Court recently held that asymptomatic HIV infection inherently limits certain major life activities. *Bragdon v. Abbott*, 118 S.Ct. 2196 (1998). The Court specifically declined to rule on the question of whether HIV infection constitutes a *per se* disability, instead conducting an individualized inquiry to determine whether HIV infection would substantially limit one or more of the plaintiff's major life activities. *Id.* 2206-2207.

[16] Although it is not fully articulated, we assume that Deas' argument in favor of recognizing seizures as a disability *per se* is based either on the premise that individuals who suffer from "seizures" face significant societal prejudice and "attitudinal barriers" to employment or on the premise that all "seizures" are actually disabling. Deas has not directed our attention to substantial evidence offered in support of either proposition, and our review of the record does not reveal any such evidence.

definition of the impairment that she would have us declare a disability *per se*. "Seizures" is quite simply too broad and too amorphous a term to be useful in describing a class of impairments that is to receive *per se* treatment.[17]

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[17] "Seizures" (as Deas has chosen to identify her impairment) vary widely both in their symptoms and their causes. The term is defined somewhat vaguely by one medical reference source as "[a] sudden episode of uncontrolled activity in the brain" or "transient neurological abnormalities caused by abnormal electrical activity in the brain." *The American Medical Association Encyclopedia of Medicine* 890 & 412 (Charles B. Clayman ed., 1989). Symptoms vary from "tingling or twitching of only a small area of the body" to "hallucinations or intense feelings of fear or familiarity" to severe convulsions and total unconsciousness. *Id.* at 890. Severe seizures can be fatal. *Id.* at 413. A second reference work notes that the "clinical manifestations of the [epileptic seizure] may vary from complex abnormalities of behavior including generalized or focal convulsions to momentary spells of impaired consciousness." *Stedman's Medical Dictionary* 584 (Marjory Spraycar ed., 26th ed.1995).

The causes of seizures are apparently as varied as their symptoms, including, *inter alia*, "head injury, infection, cerebrovascular accident (stroke), brain tumor, metabolic disturbances, or alcohol (withdrawal or hereditary intolerance of alcohol)." Clayman, *supra* at 890. "A tendency to recurrent seizures or temporary alteration in one or more brain functions" constitutes "epilepsy," which shares the same variability in symptoms and causes. *Id.* at 412. The potential causes of epilepsy include, *inter alia*, "head injury, birth trauma, brain infection (such as meningitis or encephalitis), brain tumor, stroke, drug intoxication, drug or alcohol withdrawal states, or metabolic imbalances in the body." *Id.*

Due to this wide range of symptoms and causes, the term "seizures" does not appear to describe a class of impairments that share sufficiently similar characteristics such that they

In sum, Deas has failed, both on appeal and in the court below, to provide any evidence or any reasoned argument or persuasive precedent that would warrant this Court's recognition of "seizures" as a disability *per se*. Consequently, we hold that the magistrate judge did not err in refusing to recognize Deas' seizures as a disability *per se* and in ruling that Deas did not establish, under this theory, that she was an "individual with a disability" within the meaning of the ADA.

II. "Awareness" as a Major Life Activity

In her second argument on appeal, Deas contends that the magistrate judge "erred in failing to recognize that the major life activities of seeing, hearing, and speaking are by definition and nature substantially limited in a person who has temporarily lost awareness of his or her surroundings." She also urges this Court to hold that "awareness" is a major life activity.[18] This argument is

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should be treated as a single "impairment" or "disability" under the ADA. The result of accepting Deas' argument that "seizures" constitute a disability *per se* would require courts to equate the impairment of an individual who experiences occasional "tingling" in his fingertips due to mild seizures with the impairment of an individual who experiences frequent, prolonged, and potentially life-threatening convulsions due to severe *grand mal* seizures. We view this as a legally untenable position, and conclude that the determination of whether seizures are disabling for purposes of the ADA is best left to a case-by-case analysis.

[18] The term "awareness" has a variety of meanings and is not susceptible to any precise definition. Moreover, awareness describes a state of consciousness, not a discrete life "activity." Consequently, we decline to recognize awareness *per se* as a major life activity.

analogous to Deas' assertion that seizures should be considered a disability *per se*, and we reject it for similar reasons. We decline to accept the broad proposition that every temporary loss of "awareness," no matter how brief, necessarily constitutes a substantial limitation of the major life activities of seeing, hearing, and speaking.[19]

Deas also attempts to extend this general argument to the specific context of her case, arguing in essence that because Dr. Dixon perceived her to suffer from seizures, she must also have regarded her as substantially limited in the major life activities of seeing, hearing, and speaking. Accordingly, Deas asserts that her "discharge was based solely on [Dr. Dixon's] perception that in the event of a seizure, Miss Deas would be unable to see, hear, or speak to the patients or the other workers in the hospital," and offers this as evidence that Dr. Dixon regarded her as substantially limited in these major life activities.

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[19] We note that Deas does not direct the attention of this Court to a single decision supporting this proposition. Nor does she make any reasoned argument in favor of her position. She simply asserts that a temporary loss of "awareness," no matter how brief, must be considered to substantially limit the major life activities of seeing, hearing, and speaking. This argument is not supported by either the ADA or the decisions of this Court. Although it is uncontrovertible that a seizure which causes a temporary loss of awareness briefly "limits" an individual's ability to see, hear, and speak, it is far from clear that *all* such seizures have the effect of *substantially* limiting these major life activities. As described above, the symptoms of seizures vary widely. We do not doubt that in many cases epilepsy or a general seizure disorder will substantially limit one or more major life activities. We simply decline to accept the premise that all seizures will have this effect.

Deas offers no additional evidence that Dr. Dixon perceived her as substantially limited, but simply relies on the bald assertion, based on the above reasoning, that Dr. Dixon "perceived her as being substantially limited in the major life activities of seeing, hearing, and speaking." This assertion is entirely conclusory and does not constitute evidence from which a reasonable trier of fact could conclude that Dr. Dixon regarded Deas as "substantially limited" in her ability to see, hear, and speak.

Moreover, it is axiomatic that "[a] physical impairment, standing alone, is not necessarily a disability as contemplated by the ADA." *Dutcher*, 53 F.3d at 726. To rise to the level of a disability, an impairment must substantially limit one or more major life activities. *Id.* As has been repeatedly noted, "[t]he statutory language, requiring a substantial limitation of a major life activity, emphasizes that the impairment must be a significant one." *Forrisi v. Bowen*, 794 F.2d 931, 933-34 (4th Cir.1986). Where, as in the case *sub judice*, the claim is that the plaintiff was "regarded as" having a substantially limiting impairment, the requirement that the perceived impairment be substantially limiting remains, and the plaintiff bears the burden of making a *prima facie* showing that the impairment, as the defendant perceived it, was substantially limiting.

The EEOC regulations define "substantially limits" as being either "[u]nable to perform a major life activity that the average person . . . can perform" or "[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life

activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. § 1620.2(j)(1)(i) & (ii). Dr. Dixon clearly did not regard Deas as completely "unable" to see, speak, and hear. Nor does the evidence support the conclusion that Dr. Dixon perceived Deas as being "significantly restricted as to the condition, manner, or duration" under which she could see, speak, or hear.

The summary judgment record indicates only that Dr. Dixon believed that Deas suffered from *petit mal* seizures, during which she would lose some or all awareness of her surroundings for a brief period of time. In her deposition testimony, Dr. Dixon testified that she believed Deas was experiencing *petit mal* seizures and described the symptoms of such seizures as follows:

> "[In a] petit mal seizure, one does not necessarily lose consciousness, but awareness; and they don't have a general jerking and spasmodic reaction throughout the body, but they are not aware of their surroundings. And they may move their head or face in a certain way for a certain length of time and not be aware of their environment for a few seconds."

At most, the summary judgment evidence indicates that Dr. Dixon believed (correctly) that while experiencing a seizure, Deas was limited in her ability to see, hear, and speak for "a few seconds." Other than Dr. Dixon's decision to discharge Deas, this deposition testimony constitutes the only evidence in the record as to how "substantially" Dr. Dixon perceived the seizures to limit Deas' ability to see, hear, or speak. Being unable to see,

hear, or speak for a period of several seconds does not amount to a "significant restriction" as to "the condition, manner, or duration" under which Deas could see, hear, and speak in comparison to an average member of the general population.[20] In sum, viewing the summary judgment evidence in the light most favorable to Deas, we hold that no rational trier of fact could conclude that Dr. Dixon actually perceived Deas to be substantially limited in her ability to see, hear, or speak.

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[20] For example, in *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50, 52 (5th Cir.1997), we held that an individual who was permanently blind in one eye was not substantially limited in the major life activity of seeing because he could see well enough with the other eye to engage in most typical activities. And in *Robinson v. Global Marine Drilling Co.*, 101 F.3d 35, 37 (5th Cir.1996), we held that an individual who suffered from asbestosis, which impairment had reduced his lung capacity to 50% of normal and had caused him to experience shortness of breath and difficulty climbing stairs, was not substantially limited in the major life activity of breathing. *See also Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 & n.11 (5th Cir.1995), and *Rogers v. International Marine Terminals, Inc.*, 87 F.3d 755, 759 (5th Cir.1996) (holding evidence of "a 13% permanent, partial disability" insufficient to establish disability for purposes of ADA).

Additionally, we note that Deas' claim is similar to a scenario used by the EEOC in describing how substantially limiting an impairment must be before it constitutes a disability. In its Compliance Manual the EEOC states that a "borderline" case of cerebral palsy "that only slightly interferes with an individual's ability to read . . . and to speak" is not sufficient to constitute a disability. *Rogers*, 87 F.3d at 759 (citing EEOC Compliance Manual, § 902.4(c)(1)). Similarly, Deas' seizures interfere only slightly with the actual activities of seeing, hearing, and speaking.

III. The Major Life Activity of Work

Deas' final argument on appeal is that Dr. Dixon perceived her as substantially limited in the major life activity of work. She alleges that during her exit interview "she was told by both Dr. Dixon and [Peggy Miller] that there were no other jobs in the hospital that could accommodate [her], and that therefore she was fired from the hospital altogether." Deas argues that this "proves the defendants perceived [her] to be substantially limited in her ability to work in any clinic or hospital setting." (Emphasis added.)[21] Deas further asserts that this demonstrates that Dixon and Miller believed her to be substantially limited as to both medical and nonmedical occupations and positions, including those of "administrators, secretaries, receptionists, clerks, housekeepers, dieticians, librarians, kitchen workers, maintenance workers, groundskeepers, janitors, and social service workers." This assertion is without legal merit and lacks evidentiary support.

With respect to the major life activity of working, "substantially limits" is defined as "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills,

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[21] Dr. Dixon testified in her deposition that even an individual suffering from *petit mal* seizures that are *not* under "good control" could work safely in a variety of employment situations. She specifically stated, for example, that Deas – whose seizures she did not consider to be under "good control" – could safely work "in a number of places" and that Deas "could be a good receptionist."

and abilities." 29 C.F.R. § 1630.2(j)(3)(i). "The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working."[22] Thus, Dr. Dixon's belief that Deas was incapable of fulfilling the essential functions of an "addiction technician" in a hospital substance abuse treatment unit does not establish that she regarded her as being substantially limited in her ability to work in general.

Furthermore, Deas' assertion that Dr. Dixon and Peggy Miller regarded her as substantially limited in her ability to work is not supported by the record. There is no evidence that either thought that Deas could not work safely in either "a class of jobs or a broad range of jobs in various classes." Because Dr. Dixon is the one who decided to discharge Deas, Peggy Miller's perception of Deas is irrelevant to Deas' argument.[23] Consequently we

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[22] *Id. See also Chandler v. City of Dallas*, 2 F.3d 1385, 1393 (5th Cir.1993) ("An employer's belief that an employee is unable to perform one task with an adequate safety margin does not establish per se that the employer regards the employee as having a substantial limitation on his ability to work in general."); and *Forrisi*, 794 F.2d at 934 ("Several courts have previously addressed this issue, deciding unanimously that an employer does not necessarily regard an employee as handicapped simply by finding the employee to be incapable of satisfying the singular demands of a particular job.").

[23] There is a possibility that Deas is attempting to assert the claim that Miller discriminated against her by refusing to reassign her to a different position within the hospital. Deas, however, cannot prevail on this claim because she has not made any showing either that positions were available or that she applied for, requested to be considered for, or even showed an interest in other positions at the hospital. Deas bears the initial burden of producing evidence on these issues. *See Foreman v.*

limit our discussion to the evidence of Dr. Dixon's perceptions.

In her deposition testimony, Dr. Dixon stated that she could name "a number of places" where she thought Deas could work. Dr. Dixon further made clear that the reason she believed that Deas could not safely work in a substance abuse clinic was that the patients being treated for substance abuse "would be of [a] higher risk" than typical patients. Dr. Dixon also indicated that she only perceived the seizures as a problem because employment in a substance abuse unit required a certain level of vigilance that an individual suffering from seizures would be unable to provide. Dr. Dixon analogized the requirements for working in a substance abuse unit to other occupations that require uninterrupted awareness or vigilance, stating, for example, that "if a person was an airplane pilot, seizures are not acceptable." Thus, the summary judgment evidence does not support the assertion that Dr. Dixon regarded Deas as unable to work safely in a broad range of jobs. In sum, there is simply no indication in the record that Dr. Dixon regarded Deas as substantially limited as to anything more than a few,

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Babcock & Wilcox Co., 117 F.3d 800, 810 (5th Cir.1997). Absent any evidence that such positions were available and absent any allegation that Deas requested to be considered for such a position, Deas has not even stated a claim of discrimination in hiring practices let alone produced sufficient evidence to survive a motion for summary judgment. Thus, even if the record contained evidence that Miller perceived Deas as disabled (which, incidentally, it does not), Deas' claim would still fail, and Miller's perceptions are therefore irrelevant to the disposition of this case.

highly specialized jobs that required relatively high levels of vigilance or uninterrupted awareness.[24]

Accordingly, because Deas has produced no evidence from which a rational trier of fact could conclude that Dr. Dixon perceived her as substantially limited in her ability to work generally, we hold that the magistrate judge did not err in granting summary judgment in favor of the defendants-appellees on this issue.

Conclusion

In conclusion we note that the record is devoid of any indication that Dr. Dixon overestimated the severity of Deas' impairment, overreacted to her seizures, or made the decision to terminate Deas based on a misperception as to Deas' capabilities. The ADA prohibits discrimination on the basis of disability "to ensure that [such] individuals are not denied jobs or other benefits because

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[24] The magistrate judge concluded that "There is no evidence that the defendants believed [Deas] could not, or should not, obtain work in this field [*i.e.*, general psychology] because of her seizures. Viewing the summary judgment evidence in the light most favorable to the plaintiff shows that at most the defendants perceived the plaintiff was unable to work in a single job – as an addiction technician in a substance abuse unit or a hospital." It appears, however, that, when viewed in a light most favorable to Deas, the summary judgment evidence is sufficient that a reasonable trier of fact could conclude that Dr. Dixon regarded Deas as unable to perform more than just the single job of "addiction technician," but there is no support whatsoever for a finding that Dr. Dixon perceived Deas to be incapable of working in a broad range of jobs.

of the prejudiced attitudes or the ignorance of others."[25] There is no evidence that Dr. Dixon's decision to terminate Deas was based on anything but concern for the safety of Deas and of the patients that would be treated in the substance abuse unit. Deas has offered no evidence that Dr. Dixon's decision was in any way unreasonable or motivated by a malign or legally prohibited motive. Accordingly, we hold that the magistrate judge did not err in granting summary judgment in favor of the defendants-appellees. The judgment of the magistrate judge is therefore

AFFIRMED.

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[25] *School Bd. of Nassau County v. Arline*, 107 S.Ct. 1123, 1129 (1987). *See also* 29 C.F.R. Pt. 1630.2(1) App. (adopting the reasoning and rationale of *Arline* as applying to the ADA).

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

ALLISON DEAS

VERSUS

RIVER WEST, L.P.
ET AL

CIVIL ACTION

NUMBER 95-353-B-1

JUDGMENT

Judgment is hereby rendered in favor of defendants River West, L.P., Alternative Addiction Treatment Concepts, Inc., and Strother P. Lindsey-Dixon, and against plaintiff Allison Deas, dismissing the plaintiff's claims, with prejudice.

Costs allowed under 28 U.S.C. §1920 shall be taxed by the Clerk of Court in accordance with Uniform Louisiana Local Rule 5.04, et seq.

Baton Rouge, Louisiana, February 6, 1997.

/s/ Stephen C. Riedlinger
UNITED STATES
MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

ALLISON DEAS

VERSUS

RIVER WEST, L.P., ET AL

CIVIL ACTION

NUMBER 95-353-B-1

RULING ON MOTIONS FOR SUMMARY JUDGMENT

This matter is before the court on motions for summary judgment filed by the plaintiff, Allison Deas, and defendants River West, L.P., Alternative Addiction Treatment Concepts, Inc. (AATC), and Strother P. Lindsey-Dixon. All motions are opposed.

Plaintiff brought this action under the Americans With Disabilities Act, 42 U.S.C. §12101, et seq. (ADA). Plaintiff was hired on July 13, 1993 to work as an addiction technician in an inpatient substance abuse program located at River West hospital. Plaintiff's exhibit 9. Plaintiff claimed that her discharge one month later[1] was in violation of the ADA and also alleged that during the job application process she was subjected to preemployment medical inquiries that violated the ADA.

Plaintiff filed a motion for summary judgment on the issue of the status of AATC and River West as "employers" under the ADA. Record document numbers

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[1] Plaintiff was discharged on August 13, 1993. Record document number 35, exhibit A (copy of EEOC charge).

55-57, 60. Plaintiff also filed a supplemental memorandum and moved for summary judgment on the issue of liability. Record document numbers 92, 93 and 94. Defendant River West filed a cross motion for summary judgment arguing that it was not the plaintiff's employer and that the plaintiff is not disabled within the meaning of the ADA. Record document numbers 63, 64, 65 and 66. AATC also filed a motion for summary judgment on the ground that the plaintiff is not a qualified individual with a disability. River West's motion also relied on the motion and exhibits previously filed by all the defendants on the issue of employer status. Record document numbers 7, 8 and 9.

Status of River West and AATC as Plaintiff's Employer under the ADA

Before addressing the merits of the plaintiff's ADA claim the court must determine whether the plaintiff was an employee of an "employer." This is a threshold issue of subject matter jurisdiction.[2] Because the issue is one of subject matter jurisdiction unrelated to the elements the plaintiff must prove to establish an ADA violation, the court may make factual determinations to decide the issue.[3]

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[2] Whether a defendant is an employer under the ADA is an issue of subject matter jurisdiction. *See, Womble v. Bhangu,* 864 F.2d 1212, 1213 (5th Cir. 1989); *Deal v. State Farm County Mut. Ins. Co. Tex.,* 5 F.3d 117, 118 n. 2 (5th Cir. 1993) (employer status under Title VII and the ADEA is an issue of subject matter jurisdiction).

[3] The court has the power to dismiss for lack of subject matter jurisdiction on any of three basis: (1) the complaint alone;

Plaintiff asserted that the summary judgment evidence shows she had an employment relationship with River West, therefore either River West was her employer or her joint employer with AATC. AATC conceded that it was the plaintiff's employer, but argued it did not have the requisite number of employees to meet the statutory definition. River West argued that AATC was the plaintiff's sole employer; that it had no employment relationship with the plaintiff and was not a single or joint employer with AATC.

At the time the alleged discriminatory conduct occurred, the ADA defined "employer" as a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person. 42 U.S.C. §12111(5)(A).[4] Determining whether a defendant is an employer under

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(2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981); *Lewis v. Knutson*, 699 F.2d 230, 237 (5th Cir. 1983). Factual determinations decisive of a motion to dismiss for lack of jurisdiction are within the court's power, and no right to a jury trial exists on such issues. *Williamson*, 645 F.2d at 414.

[4] Except for the number of employees, the definition of "employer" under the ADA is substantially the same as the definitions of "employer" in Title VII, the Age Discrimination in Employment Act (ADEA), and the Fair Labor Standards Act. This is also true of the statutory definitions of "employee." Therefore, the cases cited in this ruling may involve one or more of these acts. *See, Jenkins v. Board of Education of Houston Ind. School Dist.*, 937 F.Supp. 608, 612 (S.D. Tex. 1996); *Hyland v. New Haven Radiology Assoc.*, 794 F.2d 793, 796 (2d Cir. 1986).

the ADA involves two inquiries: (1) does the defendant have the number of employees required by the statutory definition,[5] and (2) does an employment relationship exist between the plaintiff and the defendant. *Deal, supra.*

Both defendants contend that AATC was the only employer of the plaintiff. In connection with their initial motion for summary judgment on this issue, the defendants submitted the affidavits of Dixon and Larry Bay along with payroll information showing that AATC issued payroll checks to the plaintiff. Record document number 9, exhibits A-H. Based on this evidence, which the plaintiff has not refuted, the summary judgment record establishes that the plaintiff had an employment relationship with AATC.

But was there an employment relationship between the plaintiff and River West?

Plaintiff sought to establish the employer status of River West through both the hybrid economic realities/control test and the theories of single and joint employer.

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[5] River West has never contended that it did not have the requisite number of employees to satisfy the statutory definition. AATC asserted this basis for dismissal in its initial motion for summary judgment and submitted evidence in support of this argument. Record document number 9, exhibits D and H. However, if River West was the single or a joint employer of the plaintiff, the fact that AATC alone did not have enough employees will not result in the court losing subject matter jurisdiction. If two entities are determined to be single or joint employers, their combined number of employees are used to determine whether they satisfy the statutory definition of employer. *Armbruster v. Quinn*, 711 F.2d 1332, 1338 (6th Cir. 1983).

In determining whether an employment relationship exists, the Fifth Circuit utilizes a "hybrid economic realities/common law control test." *Deal, supra, citing, Fields v. Hallsville Indep. Sch. Dist.*, 906 F.2d 1017, 1019 (5th Cir. 1990), *cert. denied*, 498 U.S. 1026, 111 S.Ct. 676 (1991); *Mares v. Marsh*, 777 F.2d 1066, 1068 (5th Cir. 1985). This test is generally applied to determine whether an individual has an employee or independent contractor relationship with a particular employer. *Mares, supra; Johnson v. El Paso Pathology Group*, 868 F.Supp. 852, 860-61 (W.D. Tex. 1994). The right to control an employee's conduct is the most important component of this test and the focus is on whether the alleged employer has the right to hire and fire the employee, the right to supervise the employee, and the right to set the employee's work schedule. *Deal*, 5 F.3d at 119. The economic realities focus on whether the alleged employer paid the employee's salary, withheld taxes, provided benefits and set the terms and conditions of employment. *Id.*

The theories of single or joint employer involve distinct concepts, yet require analysis of similar factors. *See, Rivas v. Federacion de Asociaciones Pecuarias de Puerto Rico*, 929 F.2d 814, 820 n. 16 (1st Cir. 1991);[6] *Virgo v. Riviera Beach Associates, Ltd.*, 30 F.3d 1350, 1359-60 n. 6 (11th Cir. 1994). The single employer inquiry examines the circumstances of two allegedly separate business enterprises to determine whether they should be treated as a single entity. *Id.* The joint employer concept recognizes that the

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[6] *Rivas* involved a claim under the ADEA and the issue was whether two separate companies were the joint employer of the plaintiffs who were stevedores and hatchtenders.

business entities involved are in fact separate, but that the employer which contracts with another independent company has retained for itself a degree of control over the terms and conditions of employment of the independent company's employees. *Rivas*, 929 F.2d at 820 n. 17.

In federal employment discrimination cases the tests for determining whether a single or joint employer is involved are drawn from the labor relations context. *See, McKenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930, 933 n. 3 (11th Cir. 1989); *Rivas*, 929 F.2d at 820 n. 15. The criteria for determining whether separate entities are so interrelated that they should be treated as a single, integrated enterprise, making the individual's status as the employee of one attributable to the other are: (1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control. *Trevino v. Celanese Corp.*, 701 F.2d 397, 403-04 (5th Cir. 1983), *citing, Armbruster v. Quinn*, 711 F.2d 1332 (6th Cir. 1983); *Garcia v. Elf Atochem North America*, 28 F.3d 446, 450 (5th Cir. 1994).

To determine whether an entity exercises sufficient control over another's employees to constitute a joint employer the court looks to such factors as the supervision of the employees' day-to-day activities, authority to hire or fire, promulgation of work rules and conditions of employment, work assignments and issuance of operating instructions. *Rivas*, 929 F.2d at 820-21. In the joint employer context the focus is on immediate control over the employee, and the factors that determine control are hiring, firing, discipline, pay, insurance, records and supervision. *Id.; Texas World Service Co., Inc. v. National Labor Relations Board*, 928 F.2d 1426, 1432 (5th Cir. 1991).

It is evident that the plaintiff was an employee and had an employment relationship with some entity. It is unnecessary to review and discuss all the evidence which was addressed in the ruling on the defendants' first motion for summary judgment. Nothing in the affidavits or deposition testimony relied upon by the defendants refutes any of the underlying facts as evidenced by the documents showing the application and hiring process that the plaintiff went through for the position. All of this evidence, as well as key provisions of the contract between River West and AATC, reasonably supports only one conclusion – River West employed the plaintiff. Plaintiff's exhibits 1-39. By virtue of the contract River West not only had the right of control, it did control many aspects of the daily operation of the substance abuse unit. Each employment document in the summary judgment record shows the joint participation of the individuals in charge at AATC and River West in employment matters related to the plaintiff, including advertising the position, hiring, orientation, providing fringe benefits, and discharge.[7] Plaintiff's exhibits 2, 3, 6-9, 12, 15, 19-24, 27. Because the unit was opened for admission of patients only a few days before the plaintiff was fired, what occurred during the actual day-to-day supervision of the plaintiff is unclear. Plaintiff's depo. pp. 33-34. However, in considering joint employment status, not only actual control, but the authority or power to control is highly

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[7] Though it is disputed whether Peggy Miller actually spoke at the exit interview, it is undisputed that Miller and Dixon both met with the plaintiff to inform her of the discharge. Plaintiff's exhibit 30.

relevant. *Virgo*, 30 F.3d at 1361. The employment orientation documents, contract, and deposition testimony of Ferrelli, Dixon and Miller make it clear that River West had extensive authority to control the terms and conditions of the plaintiff's employment on a daily basis. Record document number 66, exhibit 2, deposition of John Ferrelli, CEO of River West in 1993; record document number 94, excerpts of deposition of Peggy Miller, Human Resources Director of River West; record document number 95, deposition of Strother Lindsey-Dixon, pp. 13, 16-17, 25-26, 30-31, 49-50, 58.

In their statements and testimony, Dixon, Miller and Ferrelli present the facts in terms that support the defendants' position.[8] Dixon, Ferrelli and Miller consistently state that all of River West's forms were provided to AATC as a convenience because AATC was just starting up and had no forms of its own. However, River West did not just provide the forms, its CEO and human resources director signed the forms. Moreover, there is no evidence that AATC ever used or even developed its own employment forms.[9] Plaintiff stated that she was never told that AATC was her employer, and the defendants offered no evidence to dispute this statement. Plaintiff's depo. pp. 48-49. The fact that AATC never had its own forms, that the plaintiff reasonably believed River West was her employer, and that the contract between the two entities was entered into almost three weeks after the plaintiff

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[8] See also affidavit of Joe Terrell, exhibit 5, record document number 66.

[9] Miller's affidavit, para. 9; Ferrelli's depo. pp. 41, 46-48, 94, 117; Dixon's depo. pp. 49-50.

was hired, supports the conclusion that River West was her employer. River West allowed the plaintiff to complete forms for federal tax purposes stating that it was the plaintiff's employer. Plaintiff's exhibit 14. River West, through its human resource director Miller, even signed the employment eligibility verification form attesting that the plaintiff was a U.S. citizen and eligible to work. Plaintiff's exhibit 10.

The contract, documents and deposition testimony also demonstrate an extensive financial relationship between AATC and River West. AATC received an initial loan of funds to begin operation from River West. Patients in the substance abuse program were actually River West's patients and the money received for services belonged to River West. Any income generated from the services on the unit came to AATC only through River West. In addition River West handled all the billing and accounts receivable for the substance abuse unit. Ferrelli's depo. pp. 104-113.

Defendant River West relied on evidence explaining that the need to maintain its accreditation as a hospital was the reason for the authority and control it exercised over the unit and its employees. Ferrelli's depo. pp. 25-35. That River West had a good reason to retain authority over and control of the persons working on the unit is irrelevant. What is relevant is the fact that an interrelationship of authority and control existed. The overwhelming preponderance of the evidence establishes that River West retained sufficient control of the plaintiff's employment so that both AATC and River West shared or "co-determined those matters governing the essential terms and conditions" of the plaintiff's employment.

Virgo, 30 F.3d at 1360, *citing*, *National Relations Board v. Browning-Ferris Industries*, 691 F.2d 1117, 1122 (3rd Cir. 1982). The fact that River West did not exercise full control in all areas of employment relations does not prevent a finding that it was the plaintiff's joint employer. In practice a company may exercise control in varying degrees in different areas.[10]

The evidence supports an alternative finding that the plaintiff had an employment relationship with River West under the hybrid economic realities/common law control test. River West shared in the authority to hire and fire, as well as to supervise the plaintiff. The evidence is undisputed that River West represented to the plaintiff that it determined many of the conditions of her employment, including leave policy, on the job discipline and personal appearance. The economic reality of the relationship between AATC and River West was that in managing the unit, AATC was financially dependent on River West in terms of both accounting functions and obtaining revenue from its efforts. In terms of the economic relationship with the plaintiff, even if River West did not actually issue the plaintiff's paycheck, it stated on a federal income tax withholding form that it was the plaintiff's employer and provided benefits such as credit union membership and cafeteria discounts.

Because of the contractual relationship between AATC and River West, the joint employer, rather than the single employer theory is more applicable. However, a preponderance of the evidence would even support a

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[10] *Rivas*, 929 F.2d at 821.

finding under the factors of the *Trevino* test.[11] The evidence discussed here and in the previous summary judgment ruling[12] establishes by a preponderance of the evidence that the substance abuse program managed by AATC functioned as department within River West, and had a dependent, symbiotic relationship with the hospital in terms of its daily operation and financial management. Admittedly some evidence (such as paragraph seven of the contract,[13] the fact that the defendants were separate corporations with separate bank accounts, and the testimony of Dixon, Miller and Ferrelli that the plaintiff was not River West's employee) does not support this conclusion. While on the one hand the presence of any single factor is not conclusive, on the other hand, all four criteria need not be present to make a finding of employment under the single employer theory. *Armbruster*, 711 F.2d at 1337. Again, the focus is the right to control and economic realities of the relationships, and not necessarily the written documents and agreements of the parties.[14]

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[11] The joint employer inquiry is similar to the second factor of the *Trevino* test. The second factor is centralized control of labor relations. *See, Mochelle v. J. Walter, Inc.*, 823 F.Supp. 1302, 1307 (M.D. La. 1993), *aff'd*, 15 F.3d 1079 (5th Cir. 1994).

[12] Record document number 28, ruling on motion for summary judgment, pp. 3-6.

[13] Paragraph seven stated that AATC and River West were independent contractors and that no person employed by or associated with either party would be deemed an employee of the other.

[14] In determining whether an employment relationship exists, the intent of the parties is one factor to consider, but the right to control and economic realities of the relationship are determinative. *See, Fields*, 906 F.2d at 1019-20.

Is The Plaintiff "Disabled" Within the Meaning of the ADA?

All parties moved for summary judgment on the merits of the plaintiff's ADA claim. Summary judgment is only appropriate when the moving party, in a properly supported motion, demonstrates that there is no genuine issue of material fact, and that it is entitled to judgment in its favor as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2552-55 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2510 (1986); Rule 56(c), Fed.R.Civ.P. If the moving party carries its burden under Rule 56(c), the opposing party must direct the court's attention to specific evidence in the record which demonstrates that it can satisfy a reasonable jury that it is entitled to verdict in its favor. *Anderson*, 106 S. Ct. at 2512; Rule 56(e). This burden is not satisfied by some metaphysical doubt as to the material facts, conclusory allegations, unsubstantiated assertions or only a scintilla of evidence. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). After adequate time for discovery, Rule 56 mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which it will bear the burden of proof at trial. *Celotex*, 106 S.Ct. at 2552. Summary judgment is appropriate in any case where evidence is so weak or tenuous on essential facts that it could not support a judgment in favor of the nonmoving party. *Little*, 37 F.3d at 1076. In resolving the motion the court must view the facts and inferences in the light most favorable to the nonmoving party, and the court may not evaluate the credibility of the witnesses, weigh the evidence or resolve factual disputes.

International Shortstop, Inc. v. Rally's, Inc., 939 F.2d 1257, 1263 (5th Cir. 1991), *cert. denied*, 502 U.S. 1059, 112 S.Ct. 936 (1992).

The substantive law identifies which facts are material. *Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 195 (1994). In this case the court must apply the relevant provisions of Title I of the ADA which prohibits discrimination in employment against persons with disabilities. The statute prohibits an employer from making employment decisions based on a person's disability. To establish a violation of the ADA, the plaintiff must prove the following elements: (1) that she has a disability; (2) that she was qualified for the job, and (3) that an adverse employment decision was made because of her disability. *Robinson v. Global Marine Drilling Co.*, 101 F.3d 35, 36 (5th Cir. 1996). Thus, for the plaintiff to prevail on her claim, she must satisfy the threshold requirement that she has a disability as it is defined under the ADA. *Rogers v. International Marine Terminals, Inc.*, 87 F.3d 755, 758 (5th Cir. 1996). It is undisputed that the plaintiff had some form of seizures,[15] and that she was discharged from her position as an addiction technician because of this condition. What is in dispute is whether the plaintiff suffers from a disability as that term

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[15] Plaintiff testified that she had seizures which were caused by a lesion in the left side of her brain. This condition was diagnosed in 1983. Plaintiff's depo. pp. 21-24. Plaintiff also testified that her seizures are not disabling and that she does not consider herself to be disabled. Except for a few recreational activities, she stated that there are no activities which she cannot engage in or jobs that she cannot do because of her seizures. Plaintiff's depo. pp. 58-62.

is defined by the ADA. *Bridges v. City of Bossier*, 92 F.3d 329, 331 (5th Cir. 1996).

Under the ADA there are three possible avenues for proving disability. An individual is disabled if: (1) she has a physical or mental impairment that substantially limits one or more of the major life activities; (2) she has a record of such an impairment; or (3) she is regarded as having such an impairment. 42 U.S.C. §12102(2); 29 CFR §1630.2(g). Plaintiff makes her claim under the third definition of disability – that her impairment is not substantially limiting but the defendants regarded her as having a physical impairment that substantially limited her in the major life activities of working, and consciousness or awareness.[16]

The fact that a person has some impairment does not necessarily result in a finding that a person is disabled. The impairment must cause the person to be substantially limited in a major life activity.[17] The ADA does not define

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[16] There are three different ways in which an individual may satisfy the definition of "being regarded as having a disability." The first is that the individual has an impairment which is not substantially limiting but is perceived by the employer or other covered entity as constituting a substantially limiting impairment." 29 CFR §1630.2(1)(1).

[17] A physical impairment standing alone is not necessarily a disability as contemplated by the ADA. The statute requires an impairment that substantially limits one or more of the major life activities. *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 725 (5th Cir. 1995). The appendix to the EEOC regulations state that the existence of a physical or mental impairment is determined without regard to mitigating measures such as medication. The example of epilepsy is noted. A person "with epilepsy would be considered to have an impairment even if the symptoms of the

"substantially limits" or "major life activity," but the EEOC regulations and recent Fifth Circuit decisions provide significant guidance. *Bridges*, 92 F.3d at 332.

Plaintiff's first contention is that the defendants perceived that she was substantially limited in the major life activity of working. Substantially limited in the major life activity of working means one must be significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes, as opposed to the average person having comparable training, skills and abilities. *Bridges*, 92 F.3d at 332, 335; 29 CFR §1630.2(j)(3)(i). The inability to do a single, particular job does not constitute a substantial limitation in the major life activity of working. *Id.*

Dixon testified that she believed that the plaintiff had petit mal seizures that were not under good control. She believed that awareness of surroundings was a major life activity and that the type of seizures the plaintiff had constituted an impairment of the major life activity of being aware of her surroundings. According to Dixon, with this condition it would be dangerous for the plaintiff to work on a substance abuse unit. Dixon's depo. pp. 6-11, 29-30. Plaintiff testified that at her exit interview Dixon referred to her condition as seizures, and that Dixon told her that this condition might be harmful to the patients. Plaintiff also testified that both Miller and Dixon informed her that they could not find a job to accommodate her anywhere else in the hospital. Plaintiff's depo.

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disorder were completely controlled by medicine." 29 CFR Pt.1630.2(h), App.

pp. 41, 65, 66 and 69. This evidence is consistent with Ferrelli's testimony that Dixon told him she was terminating an employee because the employee had seizures, and she was uncomfortable with the employee working in a substance abuse environment. Ferrelli's depo. pp. 63-64.

This is not evidence from which a reasonable trier of fact could conclude that the defendants perceived that the plaintiff was significantly restricted in her ability to do a class of jobs or a broad range of jobs in various classes. This conclusion is supported by the Fifth Circuit's decision in *Bridges*. The court upheld the district court's finding that an individual with a mild form of hemophilia, who was perceived as unable to perform any job involving routine exposure to extreme trauma, was substantially limited in only a narrow range of jobs. The court held that firefighting jobs, including firefighter and associated municipal paramedics or emergency medical technicians who must serve as backup firefighters, was too narrow a field to be a class of jobs under 29 CFR §1630.2(j)(3)(i). In its opinion the court noted that the regulations are unclear on what constitutes a class of jobs, and cited with approval cases which suggest that not being able to work in one's chosen field does not per se establish a substantial limitation on working, and that working as a major life activity does not necessarily mean working at the job of one's choice. *Bridges*, 92 F.3d at 335 n. 10.

Plaintiff had a college degree in psychology. Plaintiff's depo. pp. 8-9. There is no evidence that the defendants believed the plaintiff could not, or should not, obtain work in this field because of her seizures. Viewing

the summary judgment evidence in the light most favorable to the plaintiff shows that at most the defendants perceived the plaintiff was unable to work in a single job – as an addiction technician in a substance abuse unit or a hospital. Plaintiff did not come forward with any evidence as to the number or types of jobs in the unit or the hospital that she could do but for that the defendants' perception of her limitations.[18] In the absence of such evidence, the court cannot find that the defendants' beliefs about the plaintiff's seizures rendered her unable to perform a class of jobs, or a broad range of jobs in various classes, as opposed to the average person having comparable training and abilities. Thus, the plaintiff has failed to come forward with sufficient evidence to preclude summary judgment on the issue of whether she was perceived to be substantially limited in the major life activity of working.

Plaintiff also argued that the defendants perceived that she was substantially limited in the major life activity of awareness. Dixon testified that she believed that the plaintiff was substantially limited in this area. Nevertheless, there is no persuasive authority to support the

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[18] In regard to the major life activity of working, the ADA regulations provide additional factors to consider other than those related to the nature and severity of the impairment. These factors are the geographical area to which the individual has reasonable access, and within that geographical area, the number and types of jobs utilizing or not utilizing the training, knowledge, skills or abilities similar to the job from which the plaintiff has been disqualified. 29 CFR §1630.2(j) (3). The plaintiff did not provide any evidence related to these factors. *See, Dutcher*, 53 F.3d at 727 n. 13.

notion that awareness is a major life activity within the meaning of the ADA. The regulations define major life activities as the functions of caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 CFR §1630.2(i). The appendix to the regulations state that this list is not exhaustive, and that other major life activities could include lifting, reaching, sitting or standing. 29 CFR Pt. 1630.2(i), App. Awareness is not mentioned in the regulations, and the plaintiff cites no authority or rational basis for finding that awareness is a function that should be considered a major life activity under the ADA.

Plaintiff also argued that the fact the defendants perceived she had epilepsy or seizures automatically means she is perceived to be disabled under the ADA. Plaintiff relied upon Rehabilitation Act and ADA cases which appear to find that epilepsy or seizures are impairments that are disabling per se. First, the cases cited by the plaintiff are unpersuasive because they contain little or no analysis, assume for purposes of the ruling that epilepsy or seizures are disabling impairments, or merely rely upon cases that have not analyzed the issue.[19] Moreover, the appendix to the regulations clearly state that both the ADA and Rehabilitation Act do not attempt to list impairments that are disabilities because some impairments may be disabling for particular individuals but not for others. The determination of whether an individual has a disability is determined case by case. It is not based on the name or diagnosis of the impairment but on

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[19] See the cases cited by the plaintiff on pages 4-5 of her supplemental memorandum. Record document number 93.

the effect of that impairment on the life of the individual. 29 CFR Pt. 1630.2(j), App. In *Bridges*, the Fifth Circuit noted its rejection of the plaintiff's argument that hemophilia was a disability per se, citing 29 CFR Pt. 1630.2(j), App. *Bridges*, 92 F.3d at 335 n. 11. The interpretive guidelines do indicate that some impairments, such as HIV, are disabling per se. But nothing in the statute or regulations states that epilepsy or seizures is automatically disabling.[20] Thus, the plaintiff's contention must be rejected.

Plaintiff also argued that the defendants' failure to fully investigate her condition before discharging her established that the defendants acted upon "myths, fears, and stereotypes," about her impairment.[21] Plaintiff asserted that this is the type of conduct the ADA was designed to prevent. Again, the threshold issue in an ADA case is whether the plaintiff can meet the statute's definition of "disability." Proof that the defendants acted upon myths or fears about seizures is not proof that the defendants perceived that the plaintiff was disabled, i.e., significantly restricted in the major life activity of working, or substantially limited in any other major life activity. *Bridges*, 92 F.3d at 335 n. 11.[22]

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[20] The interpretive guidelines do indicate that epilepsy is an impairment. *See*, 29 CFR Pt. 1630.2(h), App. Again, under the ADA the fact that a person has an impairment does not mean that she meets one of the definitions of "disability" under section 12102(2).

[21] *See*, Dixon's depo. pp. 22-23.

[22] Plaintiff did not allege or argue that she meets the definition of disability under the second alternative – a record of such an impairment. 42 U.S.C. §12102(2); 29 CFR §1630.2(k). Plaintiff submitted a health questionnaire she completed after

Plaintiff's Claim Based on Preemployment Inquiries

Plaintiff also amended her complaint with an allegation that the defendants violated the ADA's provisions prohibiting preemployment medical examinations or inquiries of job applicants before a conditional offer of employment. 42 U.S.C. §12112(d); 29 CFR §1630.13. To the extent the plaintiff alleged and asserted that this is a separate violation and claim under the ADA, it must also be dismissed.[23]

This court has held that if a separate claim can be brought for violation of section 12112(d), it must be brought by a qualified individual with a disability as that term is defined under the ADA. *See, Armstrong v. Turner*

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she was offered the job. Plaintiff's exhibit 40. On this form the plaintiff indicated that she has a history of epilepsy or seizures and dizziness from 1978-1992. However, the plaintiff did not argue or come forward with any evidence that this was a record of an impairment that substantially limited her in a major life activity.

[23] Plaintiff moved for summary judgment on this issue, included it in her statement of undisputed facts, and briefly addressed it in her supplemental memorandum. Record document numbers 55, 93, 60 (statement of material facts number 6). Defendants did not dispute the facts relevant to the issue (plaintiff's exhibit 3), but contended that the plaintiff has presented no evidence that she suffered any damages as a result of the alleged unlawful preemployment inquiry. Since the underlying facts are undisputed, the issue has been raised in the motions, and the parties have all had an adequate opportunity to address it, the claim is appropriate for summary judgment.

Industries, ___ F.Supp. ___, 1996 WL 740999 (M.D. La., Dec. 16, 1996) (CA No. 95-1938-B-1).[24]

The ADA provisions addressing preemployment inquiries are substantially the same as those included in the regulations under the Rehabilitation Act.[25] The parties did not cite and the court did not find any cases specifically addressing the question whether an individual who does not meet any of the three alternative definitions of disability may maintain a claim for violation of the ADA's standards regarding medical inquiries during the job application process. In the absence of any controlling or persuasive authority the court must turn to the statute to discern the answer.

The starting point for statutory interpretation is the language of the statute itself. *Bailey v. United States*, ___ U.S. ___, 116 S.Ct. 501, 506 (1995). The applicable language is as follows:

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[24] *See, Buchanan v. City of San Antonio*, 85 F.3d 196, 199 (5th Cir. 1996). In *Buchanan*, plaintiff sued under the ADA when he was denied a job with the police department. One of the plaintiff's claims was for violation of the ADA's prohibitions on preemployment medical examinations. The court addressed the merits of this claim since the plaintiff had been granted judgment as a matter of law on the question. However, it does not appear that the issue of whether an individual must be "disabled" within the meaning of the ADA in order to bring such a claim was raised in the trial court or on appeal.

[25] 45 CFR §§ 84.13 and 84.14; *Doe v. Syracuse School District*, 508 F.Supp. 333, 336-37 (N.D. N.Y. 1981).

(2) Preemployment

(A) Prohibited examination or inquiry

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a **job applicant** as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(3) Employment entrance examination

A covered entity may require a medical examination after an offer of employment has been made to a **job applicant** and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination,. . . . (Emphasis added.)

Viewing these parts of the statute in isolation, the use of the term "job applicant" without any qualification or modifiers appears to lend support to the argument that an individual who is not a "qualified individual with a disability" can bring a claim under the ADA if an employer violates §12112(d)(2)-(3). Defining the plain meaning of a statutory word or phrase, however, is only the starting point in statutory construction. Not only the bare meaning of the word but also its placement and purpose in the statutory scheme must be considered. *Rowinsky v. Bryan Independent School District*, 80 F.3d 1006, 1012 (5th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 165 (1996). "The meaning of statutory language, plain or not, depends on context." *Id.*

Applying this principle, nothing in the remainder of the statute suggests that the use of the term job applicant

should be interpreted to mean that any job applicant, regardless of disability, has a claim for violation of the prohibitions related to preemployment inquiries. The first paragraph under the subsection title and preceding §12112(d)(2)(A) states that "[t]he prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries." 42 U.S.C. §12112(d)(1). This is a reference to §12112(a) which sets forth the general rule prohibiting discrimination against a "qualified individual with a disability . . . in regard to job application procedures," hiring, advancement, discharge, compensation, job training and other terms, conditions and privileges of employment. Thus, the prohibition against preemployment inquiries specifically refers back to the general prohibition against discrimination against qualified individuals with disabilities. Throughout the next paragraph, which is §12112(b), the statute further defines the types of discrimination prohibited and continues to refer to job applicants or employees who are otherwise qualified individuals with disabilities.

There is also nothing in the legislative history which supports the conclusion that Congress intended any job applicant to have a cause of action for violation of the ADA rules on preemployment examinations and inquiries. A review of the legislative history shows that the section on medical examinations and inquiries was included to parallel the same requirements and regulations under the Rehabilitation Act of 1973, and designed to prevent employers from using preemployment information obtained from forms and interviews to exclude applicants with disabilities, particularly persons with

"hidden" disabilities. H.R. Rep. No. 101-485(III), 101st Cong., 2d Sess. 4 (1990), *reprinted in*, 1990 U.S.C.C.A.N. 445, 465-67. Again, the legislative history indicates that the preemployment provisions exist to protect qualified individuals with disabilities – those who are disabled within the meaning of the ADA – not job applicants who do not meet any of the definitions of disability in §12102(2).

Considering the placement and purpose of the ADA restrictions on medical inquiries of job applicants found in §12112(d) in the context of the entire statute, the most reasonable interpretation is that if a separate claim can be brought for violation of this section, it must be brought by a qualified individual with a disability as that term is defined by the ADA.

Based on the summary judgment evidence the plaintiff is not disabled within the meaning of the ADA, therefore, the defendants are entitled to summary judgment as a matter of law on any claimed violation of 42 U.S.C. §12112(d).[26]

Claim Against Dixon

Plaintiff named Dixon in her original petition and alleged that she was liable as an agent of River West and AATC. The case law is clear that under Title VII and the ADA only employers, not individuals acting in their individual capacity who do not otherwise meet the definition

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[26] It is unnecessary to reach the question of damages raised by the defendants' given the finding that the plaintiff does not have a claim as a matter of law.

of employer, can be held liable. *Grant v. Lone Star Co.*, 21 F.3d 649, 652 (5th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 574 (1994); *Mason v. Stallings*, 82 F.3d 1007 (11th Cir. 1996) (ADA does not provide for individual liability, only for employer liability). Suing Dixon as an agent was the equivalent of naming the plaintiff's employers, and there are no allegations or evidence that Dixon herself qualifies as an employer under the ADA's definition. Therefore, to the extent the plaintiff alleged claims against Dixon individually, they must be dismissed.

Accordingly, the motion for summary judgment filed by the plaintiff on the issue of employer status is granted. The motion for summary judgment filed by the defendants Alternative Addiction Treatment Concepts, River West, L.P., and Strother P. Lindsey-Dixon is granted and this action will be dismissed.

Baton Rouge, Louisiana, January 28, 1997.

/s/ Stephen C. Riedlinger
UNITED STATES
MAGISTRATE JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-30154

D. C. Docket No. 95-CV-353

ALLISON DEAS

Plaintiff - Appellant - Cross Appellee

v.

RIVER WEST, L P; ET AL

Defendants

ALTERNATIVE ADDICTION TREATMENT CONCEPTS, INC; STROTHER P LINDSEY-DIXON

Defendants - Appellees

RIVER WEST, L P

Defendant - Appellee - Cross Appellant

Appeals from the United States District Court for the Middle District of Louisiana, Baton Rouge.

Before POLITZ, Chief Judge, GARWOOD, and BARKSDALE, Circuit Judges.

JUDGMENT

(Filed Sep 03, 1998)

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

ISSUED AS MANDATE: SEP 25 1998

AMERICANS WITH DISABILITIES ACT

(Introductory, Employment and Miscellaneous Sections)
42 U.S.C. §§ 12101-12113

§ 2 [§ 12101]. Findings and purposes

§ 3 [§ 12102]. Definitions

TITLE I – EMPLOYMENT

§ 101 [§ 12111]. Definitions

§ 102 [§ 12112]. Discrimination

§ 103 [§ 12113]. Defenses

§ 2 [§ 12101]. Findings and purposes

(a) The Congress finds that

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex,

national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies

people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) It is the purpose of this Act –

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

§ 3 [§ 12102]. Definitions

As used in this Act:

(1) The term "auxiliary aids and services" includes –

(A) qualified interpreters or other effective methods of making aurally [sic] delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) The term "disability" means, with respect to an individual –

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

TITLE I – EMPLOYMENT

§ 101 [§ 12111]. Definitions

As used in this title:

(1) The term "Commission" means the Equal Employment Opportunity Commission established by section [705 of Title VII].

(2) The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5)(A) The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this title, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) The term "employer" does not include –

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of title 26.

(6)(A) The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C. § 812]. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(B) The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C. 812].

(7) The terms "person", "labor organization", "employment agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section [701 of Title VII].

(8) The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) The term "reasonable accommodation" may include –

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10)(A) The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include –

(i) the nature and cost of the accommodation needed under this title;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) The type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

§ 102 [§ 12112]. Discrimination

(a) No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) As used in subsection (a) of this section, the term "discriminate" includes –

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or

employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this title (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration –

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise

qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c)(1) It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2)(A) If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such

corporation shall be presumed to be engaged in by such employer.

(B) This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on -

(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control, of the employer and the corporation.

(d)(1) The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

(2)(A) Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if –

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that –

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this Act shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this title.

(4)(A) A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

§ 103 [§ 12113]. Defenses

(a) It may be a defense to a charge of discrimination under this Act that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this title.

(b) The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

(c)(1) This title shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(2) Under this title, a religious organization may require that all applicants and employees conform to the religious tenets of such organization.

(d)(1) The Secretary of Health and Human Services, not later than 6 months after July 26, 1990, shall –

(A) review all infectious and communicable diseases which may be transmitted through handling the food supply;

(B) publish a list of infectious and communicable diseases which are transmitted through handling the food supply;

(C) publish the methods by which such diseases are transmitted; and

(D) widely disseminate such information regarding the list of diseases and their modes of transmissability to the general public.

Such list shall be updated annually.

(2) In any case in which an individual has an infectious or communicable disease that is transmitted to others through the handling of food, that is included on the list developed by the Secretary of Health and Human Services under paragraph (1), and which cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling.

(3) Nothing in this Act shall be construed to preempt, modify, or amend any State, county, or local law, ordinance, or regulation applicable to food handling which is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, which cannot be eliminated by reasonable accommodation, pursuant to the list of infectious or communicable diseases and the modes of transmissability published by the Secretary of Health and Human Services.

INTERPRETIVE GUIDANCE ON TITLE I OF THE AMERICANS WITH DISABILITIES ACT APPENDIX TO 29 C.F.R. PART 1630

Section 1630.2(l) *Regarded as Substantially Limited in a Major Life Activity*

If an individual cannot satisfy either the first part of the definition of "disability" or the second "record of" part of the definition, he or she may be able to satisfy the third part of the definition. The third part of the definition provides that an individual who is regarded by an employer or other covered entity as having an impairment that substantially limits a major life activity is an individual with a disability.

There are three different ways in which an individual may satisfy the definition of "being regarded as having a disability":

(1) The individual may have an impairment which is not substantially limiting but is perceived by the employer or other covered entity as constituting a substantially limiting impairment;

(2) The individual may have an impairment which is only substantially limiting because of the attitudes of others toward the impairment; or

(3) The individual may have no impairment at all but is regarded by the employer or other covered entity as having a substantially limiting impairment. Senate Report at 23; House Labor Report at 53; House Judiciary Report at 29.

An individual satisfies the first part of this definition if the individual has an impairment that is not substantially limiting, but the covered entity perceives the impairment as being substantially limiting. For example, suppose an employee has controlled high blood pressure that is not substantially limiting. If an employer reassigns the individual to less strenuous work because of unsubstantiated fears that the individual will suffer a heart attack if he or she continues to perform strenuous work, the employer would be regarding the individual as disabled.

An individual satisfies the second part of the "regarded as" definition if the individual has an impairment that is only substantially limiting because of the attitudes of others toward the condition. For example, an individual may have a prominent facial scar or disfigurement, or may have a condition that periodically causes an involuntary jerk of the head but does not limit the individual's major life activities. If an employer discriminates against such an individual because of the negative reactions of customers, the employer would be regarding the individual as disabled and acting on the basis of that perceived disability. See Senate Report at 24; House Labor Report at 53; House Judiciary Report at 30-31.

An individual satisfies the third part of the "regarded as" definition of "disability" if the employer or other covered entity erroneously believes the individual has a substantially limiting impairment that the individual actually does not have. This situation could occur, for example, if an employer discharged an employee in response to a rumor that the employee is infected with Human Immunodeficiency Virus (HIV). Even though the rumor is totally unfounded and the individual has no impairment

at all, the individual is considered an individual with a disability because the employer perceived of this individual as being disabled. Thus, in this example, the employer, by discharging this employee, is discriminating on the basis of disability.

The rationale for the "regarded as" part of the definition of disability was articulated by the Supreme Court in the context of the Rehabilitation Act of 1973 in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987). The Court noted that, although an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as disabling. "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." 480 U.S. at 283. The Court concluded that by including "regarded as" in the Rehabilitation Act's definition, "Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment." 480 U.S. at 284.

An individual rejected from a job because of the "myths, fears and stereotypes" associated with disabilities would be covered under this part of the definition of disability, whether or not the employer's or other covered entity's perception were shared by others in the field and whether or not the individual's actual physical or mental condition would be considered a disability under the first or second part of this definition. As the legislative history notes, sociologists have identified common attitudinal barriers that frequently result in employers excluding

individuals with disabilities. These include concerns regarding productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, workers' compensation costs, and acceptance by coworkers and customers.

Therefore, if an individual can show that an employer or other covered entity made an employment decision because of a perception of disability based on "myth, fear or stereotype," the individual will satisfy the "regarded as" part of the definition of disability. If the employer cannot articulate a non-discriminatory reason for the employment action, an inference that the employer is acting on the basis of "myth, fear or stereotype" can be drawn.

Supreme Court, U.S.
FILED
JAN 14 1999
CLERK

No. 98-916

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ALLISON DEAS,

Petitioner,

vs.

RIVER WEST, L.P.; ALTERNATIVE ADDICTION TREATMENT CONCEPTS, INC. and STROTHER P. LINDSEY-DIXON,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Alternative Addiction Treatment Concepts, Inc., has no parent company and no nonwholly owned subsidiaries.

ARGUMENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

As detailed below, there is no cause for this Court's review of this factbased case, which has now been rejected by the United States District Court for the Middle District of Louisiana and the United States Fifth Circuit Court of Appeals.

The petition for writ of certiorari is replete with misrepresentations and/or distortions of the record and the positions of the parties both in the District Court and the Court of Appeals. The most glaring and fundamental of these misrepresentations, the pillow upon which the whole writ application rests, relates to petitioner's mischaracterization of Dr. Dixon's perceptions relative to whether Ms. Deas' condition precluded her from working in a hospital setting. There is nothing in the record which speak to Ms. Deas' ability or inability to work in a clinic or hospital setting. Dr. Dixon, throughout her deposition, makes it clear that her concern was limited to the "unit" (Strivers Alternative Addiction Treatment Program at River West Medical Center) because of the type patients she planned to admit to that unit. Moreover, Deas' own representation contradicts her position here, that Dr. Dixon considered her to have a substantially limiting impairment (while it is doubtful this representation is true since Dr. Dixon's sole authority, in the premises, was limited to the unit, but for the purpose of this argument we will assume it to be true). Deas states that in the exit interview Dr. Dixon (and Miller) told her that they had looked for another job somewhere in the hospital that could accommodate her, but they were unable to find one; an action that could not have been logically taken if Dr. Dixon had perceived Deas' condition as precluding her from working in a clinic or hospital setting.

While some of the misrepresentations and/or distortions set out below may seem technical or minor they are actually

suggestive of the convoluted, contradictory and ever changing posture that petitioner has assumed in the District Court and the Court of Appeals. These misrepresentations are outlined as follows:

1. There is no support in the record for petitioner's characterization "epileptic-type seizures" or "purported epileptic condition" (that occurs on page 5). Petitioner, in both the District Court and Court of Appeals, claims that she is not disabled at all. The only remote reference to epilepsy appears in an entrance medical questionnaire where Deas indicated that she had bouts with epilepsy or fits from age six to age twenty, but had been free of any symptoms of this disease for three years.

2. The few times the petitioner did seek evidentiary support for her charges she grossly distort the record. For example, petitioner states, "the plaintiff presented sufficient evidence, in the form of Dr. Dixon's own deposition testimony, that Ms. Deas was regarded as unable to see, hear or speak during a seizure." (Occurring on page 15) The record shows that Dr. Dixon testified in her deposition that Ms. Deas experienced a petit mal seizure in her presence and she defined petit mal seizure as follows:

> . . . one does not necessarily lose consciousness, but awareness. And they don't have a general jerking and spasmodic reaction throughout the body, but they are not aware of their surrounding. And they move their head or face in a certain way for a certain length of time and not be aware of their environment for a few seconds

The record and the evidence is deplete of any facts to the effect that Dr. Dixon stated that she regarded Ms. Deas as being unable to see, hear or speak during a seizure.

3. Again on page 16, petitioner grossly misrepresents the fact when she states, ". . . her employer treated her as disabled and felt that the job of addiction technician was to dangerous for an 'epileptic.' " No where in the record does Dr. Dixon refer to Ms. Deas as an epileptic or describe her condition as epilepsy.

4. A further distortion of the record occurs on page 17 when the petitioner alleges,

> The evidence showed that Dr. Dixon was primarily concerned that in the event of a seizure, the plaintiff would be unable to see, hear or speak to patients and co-workers in the unit; obviously, Dr. Dixon viewed this restriction as significant, as it drove her decision to terminate Ms. Deas

Dr. Dixon's deposition testimony as to her concerns was as follows: "Because during the time of the seizures, she would be unable to help out with other patients and put herself at risk being in the presence of patients that could take advantage of her". The record is void of any reference to Ms. Deas' ability to see, hear, or speak during a seizure. This concept is one of the plaintiff's making being first introduced in plaintiff's opposition brief to the Motion for Summary Judgment before the United States District Court for the Middle District of Louisiana.

5. The petitioner's characterization of Dr. Dixon's preception as being that Ms. Deas was unable to work in any job in the hospital is based on similar liberties with the facts. On page 20 of the petition it is stated,

> Although Dr. Dixon later testified that plaintiff would be suited for work as a receptionist, there was nevertheless, evidence that at the time of Ms. Deas' termination, Dr. Dixon regarded the plaintiff as unable to work at any job in the hospital.

In context, Dr. Dixon's testimony was in response to the question. "Okay, well, tell me a place that she could work that would be safer than a hospital for someone who has seizures?" Dr. Dixon responded, "I could tell you a number of places." When asked, "so its your opinion, as a doctor, that somebody who suffer from seizures shouldn't work in a hospital at all?" Dr. Dixon responded, "I felt that the type of unit that we had and the number of employees that we had that Allison Deas, in her condition, could not be a value to the unit and could be a danger to herself." Throughout Dr. Dixon's deposition testimony she restricted her references to the fact that she believed Ms. Deas not to be an appropriate employee for the "unit."

REASONS FOR DENYING THE WRIT

1. The petition cites no decisions to support the claim that the decision of the District Court and the Court of Appeals are in conflict with decisions of other state and federal courts on parallel issues.

2. There are no other reasons for this court to address the petitioner's novel and completely unsupported argument for recognizing "seizures" as a disability per se. As indicated by the Court of Appeal, the petitioner has failed at every stage of these proceedings to provide any evidence or any reasoned argument or persuasive precedent that would warrant the court granting the petition for writ of certiorari.

3. The decisions below were a correct application of the provisions and the intent of the Americans with Disabilities Act. 42 U.S.C. §§ 12101-12113.

CONCLUSION

For the reasons outlined above, and those cited in the lower courts decisions the petition for writ of certiorari should be denied.

Respectfully submitted,

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RECEIVED
FILED
JAN 25 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-916

In The

Supreme Court of the United States

October Term, 1998

ALLISON DEAS,

Petitioner,

v.

RIVER WEST, L.P.; ALTERNATIVE ADDICTION TREATMENT CONCEPTS, INC.; and STROTHER P. LINDSEY-DIXON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT, RIVER WEST, L.P. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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31pp

OBJECTION TO QUESTIONS PRESENTED

Petitioner lists as Question Presented Number 2, the following:

> "2. Did the lower courts err by requiring the employee to prove that her employer subjectively perceived the seizure disorder to be substantially limiting of a major life activity in order to defeat summary judgment?"

Respondent objects to the presentation of such a question at this juncture. This question was not raised in the courts below. Rather, petitioner, as plaintiff and appellant below, challenged the lower courts' finding that the employer perceived plaintiff as not being substantially limited in a major life activity.

Respondent interprets the question presented as injecting a new issue at this stage of the proceedings, i.e., the propriety of the standard of proof and methodology of analysis utilized by the lower courts. Until now petitioner has only challenged the factual finding that Dr. Dixon did not regard her as substantially limited in one or more major life activities. Here, petitioner challenges the requirement that she prove such a perception irrespective of the correctness of that perception. This issue was not raised below, and should not be considered here. (Appellate brief of Petitioner, pgs. 12-14, App., pgs. 14-17.)

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REASONS FOR DENYING THE WRIT

I. THIS CASE IS NOT APPROPRIATE FOR REVIEW BY THIS COURT.

Petitioner, Allison Deas, brings a request for review of decisions of the trial court and court of appeals which turn solely upon an analysis of the facts and evidence peculiar to the case. While Deas would have this Court grant certiorari to hold, as she argued below, that epilepsy or "seizures"[1] are disabilities *per se* under the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12113 (Deas App., p. 53), the lower courts properly found that there had been no medical evidence presented by Deas that she has epilepsy, and that "seizures" were not a disability *per se*.

Deas' primary argument throughout, however, has been (and continues to be) her claim that she is disabled by virtue of having been regarded by her employer as having an impairment which significantly limits her in one or more major life activities.[2]

As to this argument, the lower courts found again, that the relevant decision maker, Dr. Strother Lindsey-

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[1] While Deas repeatedly refers in brief to epilepsy, there was never any evidence produced of any medical diagnosis of epilepsy. Throughout, Deas' condition has been characterized as "seizures."

[2] That River West is or was Deas' "employer" under the ADA has been contested by River West throughout, and continues to be contested. River West has filed a Rule 12.5 Conditional Cross Petition docketed as No. 98-1057 directed to that issue.

Dixon,[3] had perceived Deas as unable to safely fulfill the essential functions of an addiction technician in a hospital substance abuse unit – not, as urged by petitioner, that Dixon had regarded her as substantially limited in one or more major life activities.

Finally, Deas posits that the decisions below are in conflict "with decisions of other state and federal courts on parallel issues." (Deas' petition, p. 5.) However, petitioner fails to cite any such conflicting decisions.

Both courts' decisions turn upon factual analyses of the evidence. As Justice Stevens has noted, "We do not grant a certiorari to review evidence and discuss specific facts." *Texas v. Mead*, 465 U.S. 1041, 104 S.Ct. 1318, 79 L.Ed. 2d 714 (1984). Here, the lower courts made evidentiary analyses resulting in factual determinations of medical diagnosis, intent and perception.

As a factbound decision, the petitioner would have this Court review the evidence for a determination of whether the lower courts properly interpreted same, and whether their factual findings were manifestly erroneous. Under standards historically observed by this Court, this case is not appropriate for review on certiorari.

II. THE DECISIONS OF THE LOWER COURTS REGARDING DISABILITY ARE CORRECT.

A. DISABILITY *PER SE*.

Petitioner suffers from "seizures" wherein she becomes unaware of her surroundings and verbally

---

[3] Dr. Dixon was medical director of AATC. By the time this action was filed in the trial court, AATC was no longer operating.

unresponsive for brief periods. These have been characterized by Dr. Dixon as *petit mal* seizures. In applying for a position as an addiction technician in AATC's substance abuse unit, Deas disclosed a history of "epilepsy (fits, seizures)" on her health history questionnaire. She was subsequently interviewed and hired by Dr. Dixon on July 13, 1993. Employment commenced on July 29, 1993.

On August 9, 1993, Deas appeared to suffer a seizure, same being witnessed by Dr. Dixon. Later that day, Dr. Dixon was approached by another AATC employee who reported having witnessed Deas having yet another seizure.

Based upon the foregoing, Dr. Dixon concluded that Deas' seizures were not well controlled and that Deas could not safely perform the functions of an addiction technician. Accordingly, she decided to discharge Deas.

Petitioner asks this Court to hold that under the ADA, "An employee who was perceived as suffering from recurrent seizures and terminated as a direct result of that perception should be treated as an employee who was regarded by her employer as disabled *per se*." (Deas' Brief, p. 6.)

The Fifth Circuit analyzed this issue in terms of "whether Deas produced sufficient evidence for a reasonable trier of fact to find that Dr. Dixon perceived her seizures as constituting a substantially limiting impairment. In other words, to have made a *prima facie* showing of disability, Deas must have produced sufficient evidence for a reasonable trier of fact to conclude that Dr. Dixon perceived her as having an 'impairment' *and* that this impairment, if it existed as perceived by Dr. Dixon,

would have substantially limited one or more of Deas' major life activities." 152 F.3d 471, at 476.

Deas first attempted to prove illegal discrimination by Dr. Dixon by arguing that "seizures" are a disability *per se*, and that perception of seizures should automatically equate to perception of an impairment which is substantially limiting of a major life activity.

Courts have uniformly declined to recognize various impairments as disabilities *per se*, emphasizing the importance of making such a determination on an individualized, case-by-case basis. See, e.g., *Matczak v. Frankford Candy and Chocolate Co.*, 136 F.3d 933, 938 (3d Cir. 1997) ("Some individuals suffer from relatively mild forms of epilepsy which cause nothing more than 'minor isolated muscle jerks' – so we cannot and do not conclude that all epileptics are substantially limited by the impairment."); *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, (7th Cir. 1998); *Bridges v. City of Bossier*, 92 F.3d 329, 336 (5th Cir. 1996); *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50 (5th Cir. 1997); *Burch v. Coca-Cola Co.*, 119 F.3d 305 (5th Cir. 1997), *cert. denied*, 118 S.Ct. 871 (1998). Generally, the concept of a *per se* disability has been rejected as being an incorrect analysis under the ADA. *Colwell v. Suffolk City Police Dept.*, 158 F.3d 635 (2d Cir. 1998); *Reeves v. Johnson Controls World Services, Inc.*, 140 F.3d 144 (2d Cir. 1998).

Additionally, as the EEOC Interpretive Guidance, 29 C.F.R. Part 1630.2(j), App. (1997) provides:

> "Determining whether a physical or mental impairment exists is only the first step in determining whether or not an individual is disabled.

> Many impairments do not impact an individual's life to the degree that they constitute disabling impairments. An impairment rises to the level of disability if the impairment substantially limits one or more of the individual's major life activities . . .
>
> "The ADA and this part, like the Rehabilitation Act of 1973, do not attempt a 'laundry list' of impairments that are 'disabilities.' The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling, or any number of other factors . . .
>
> "On the other hand, temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities."

The illogic of petitioner's argument is apparent upon simple inspection. Presented as syllogism, it goes something like this:

A. "Seizures" are disabling *per se*, that is, substantially limiting of a major life activity;

B. Dr. Dixon perceived Deas as having a seizure disorder;

C. Therefore, Dr. Dixon regarded Deas as being substantially limited in a major life activity.

Petitioner's position, then, suggests foreclosure of any factual inquiry by the Court into *what* the employer perceived, by establishing an irrebuttable presumption not only as to the impairment's limiting extent, but as to *the observer's perception of that impairment as well*. Such a construction of the statute obviates the need for the "regarded as" prong of the definition of "disability" by militating that where one has an impairment classified as "disabling *per se*", an employer can *only* perceive an individual as substantially limited in a major life activity irrespective of the reality of the situation.[4] It further misreads the actual language of the statute, which speaks in terms of regarding "impairments," not "disabilities." In suggesting such an approach, petitioner simply asks this Court to write the concept of "impairment" out of the ADA's definition of disability as concerns the conditions of "seizure" and epilepsy.[5] As earlier noted, however, the EEOC itself eschews the concept of *disability per se* in

---

[4] This assumes, of course, that one can ignore the primary circularity of petitioner's position: that one who has a disability *per se* would qualify as *actually* disabled under the first prong of the definition of "disability," and would not, therefore, need to invoke the "regarded as" prong, as she does here.

[5] EEOC Interpretative Guidance, 29 C.F.R. Part 1630.2(h), App. (1997) plainly states that, "[A]n individual with epilepsy would be considered to have an *impairment* . . . " (Emphasis added.) That Deas has an impairment is not contested. See, also, *School Board of Nassau County, Florida v. Arline*, 107 S.Ct. 1123 at 1127, n. 5: "The department also reinforced what a careful reading of the statute makes plain, 'that a physical or mental impairment does not constitute a handicap for purposes of Section 504 (of the Rehabilitation Act) unless its severity is such that it results in a substantial limitation of one or more major life activities'." (Parenthetical material added.)

almost all cases except where, unlike here, substantial limitation of one or more major life activities is an omnipresent hallmark of the impairment, *i.e.*, the limitation is coextensive with the disease. EEOC Interpretive Guidance, 29 C.F.R. Part 1630.2(j), App. (1997).

As a final consideration, it should be noted that the petitioner never presented any medical evidence as to her diagnosis, nor did she claim to be limited by her impairment in any significant way. Although petitioner attempts to cast this case in terms of abstract and lofty policy considerations, it is in reality merely one in which the lower courts found Deas to have adduced no factual evidence to support her contentions.

B. DR. DIXON'S PERCEPTION.

Petitioner contends that the lower courts erred in "requiring the plaintiff to prove that her employer subjectively perceived her seizure disorder to be substantially limiting of a major life activity." This argument was never raised in the trial or appellate courts. Viewed differently, the argument appears to be a restatement of the "disability *per se*" argument, for one's perception is by its very nature subjective. Petitioner would as an alternative have this Court remove the concept of impairment (as distinguished from disability) from the statute such that what was perceived would not matter – if seizures were perceived, the employer would objectively be held to have perceived not impairment but disability.

Respondent respectfully submits that, had Congress so intended, it would not have gone to such lengths to

structure the analysis as it did. Rather, Congress could have, and probably would have, created certain categories of conditions as to which no proof of substantial limitation of major life activities (or proof of perception of such) would be required. It did not do this.

Petitioner invoked the "regarded as" prong of the definition as the basis for her cause of action. The plain language of the statute requires that she produce evidence from which a rational trier of fact could conclude that Dr. Dixon perceived her as substantially limited in a major life activity. Factual analysis of the evidence by the Court of Appeals failed to reveal such evidence.

Petitioner also challenges the *correctness* of Dr. Dixon's perception, something which is manifestly beyond the historical purpose and scope of this Court's certiorari review. Nevertheless, respondent would simply point out several facts supporting that perception. First, Dr. Dixon, a board-certified psychiatrist with substantial substance abuse clinic experience, did not make the decision to terminate Deas upon first witnessing her having a seizure. It was not until she was informed by an employee of another seizure on the same day that she concluded that Deas could not work in the substance abuse unit.

Second, Dr. Dixon's affidavit makes clear that she felt that Deas' condition rendered her unable to safely deal with substance abuse patients. Dr. Dixon felt that even two seizures *per month* would disqualify one from the position in question. She did not, however, consider Deas to be substantially limited in any major life activity; her reservations centered only upon Deas' ability to do the

job in question. (Dixon deposition and affidavit, App. pp. 1-13).

Finally, Dr. Dixon knew that Deas had been employed before, and felt that she could do other jobs (Affidavit of Dr. Dixon, App. pp. 2-3).

The foregoing clearly indicates that Dr. Dixon did not perceive petitioner as being substantially limited as to any major life activity, or as to the major life activity of working. Rather, she believed her to be unable to perform the functions of one job – that of addiction technician.

It is well settled that the inability to do a particular job does not constitute a substantial limitation in the major life activity of working. *Talanda v. K.F.C. National Management Co.*, 140 F.3d 1090 (7th Cir. 1998); *Reeves v. Johnson Controls World Services, Inc.*, 140 F.3d 144 (2d Cir. 1998); *Witter v. Delta Airlines*, 138 F.3d 1366 (11th Cir. 1998); *Hamilton v. Southwest Bell Telephone Co.*, 136 F.3d 1047 (5th Cir. 1998); *Ryan v. Grae & Rybicki, P.C.*, 135 F.3d 867 (2d Cir. 1998); *Davidson v. Middlefort Clinic, Ltd.*, 133 F.3d 499 (7th Cir. 1998); *Halperin v. Abacus Technology Corp.*, 128 F.3d 191 (4th Cir. 1997); *Smith v. City of Des Moines, Iowa*, 99 F.3d 1466 (8th Cir. 1996), rehearing and suggestion for rehearing en banc denied (1997); *Bridges v. City of Bossier*, 92 F.3d 329 (5th Cir. 1996).

Further, with regard to other impairments, the limitation must be "significant." *Talanda, supra; Reeves, supra; Ryan, supra; Davidson, supra.* This is also true of perception cases: the employer must regard the employee as having an impairment, and must regard that impairment as substantially limiting the employee in one or more major life activities. The job decision in question must be

based upon that perception. *Colwell v. Suffolk County Police Dept., supra; Ryan v. Grae & Rybicki, P.C., supra; Francis v. City of Meriden,* 129 F.3d 281 (2d Cir. 1997); *Roberts v. Unidynamics Corp.,* 126 F.3d 1088 (8th Cir. 1997); *Runnebaum v. Nationsbank of Maryland, M.D., N.A.,* 123 F.3d 156 (4th Cir. 1997); *Bridges v. City of Bossier, supra; Dutcher v. Ingalls Shipbuilding,* 53 F.3d 723 (5th Cir. 1995).

Clearly, the lower courts reviewed the evidence and found that Dr. Dixon perceived Allison Deas not as substantially limited in any major life activity, but as unable to perform the requirements of a particular job. Under the circumstances, this was purely a factual decision, and certiorari should not be granted.

III. CONCLUSION

The evidence was thoroughly and correctly reviewed by the lower courts. Both found petitioner's evidence factually insufficient to defeat summary judgment. This Court is respectfully urged to decline review of this matter, and to deny the petition for certiorari.

Respectfully submitted,

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APPENDIX

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned authority came and appeared **STROTHER P. LINDSEY-DIXON, M.D.**, of full age of majority and a resident of the Parish of East Baton Rouge, State of Louisiana, who, being by me first duly sworn, deposed and said:

I interviewed Ms. Allison A. Deas on June 21, 1993 for the position as Addiction Technician (for the AATC/ Strivers Alternative Addiction Treatment Program ("Strivers") and approved her for hire on July 13, 1993. Ms. Deas was a part of the first group of persons hired for the Strivers' Alternative Addiction Treatment Program.

On the afternoon of August 9, 1993 I called the staff of the Strivers' Program together for a lecture (as part of their orientation to the unit). I noticed that Mr. Lane and Ms. Deas joined the group somewhat later. When Ms. Deas came to the group she seemed distant and uncomfortable. Her condition was so obvious I asked her in front of the group whether she felt well. She responded that she had been ill with decrease appetite and weight loss. She admitted she had a headache and some stomach problem. She discussed in front of the group that she had a number of tests run but nothing could be found to account for her condition. While I was lecturing to the group I noticed Ms. Deas had a blank look on her face and she looked away. When I called her name, she did not respond and some 45 seconds later she seemed to

have regained her familiarity of her surroundings. After this episode she then began to ask questions which had no relationship to what was being discussed. It was clear to me that she had just experienced a petit mal seizure. Later, Mr. Lane, (certified substance abuse counselor) expressed to me a concern that he had relative to Ms. Deas, (with obvious reluctance), that earlier in the day Ms. Deas was sitting across from him talking and suddenly became non-communicative with no recognition on her face of his presence and unresponsive to him verbally. According to Mr. Lane this episode lasted several minutes. She then became responsive to his presence.

It was clear to me that Ms. Deas had experience two petit mal seizures in the course of one day, which to me indicated that her seizures were not well controlled. Given the nature of the type of patients (substance abuse and dually diagnosed) we anticipated being admitted to the Strivers Program and the fact that the Strivers Program included a medical detoxification program which would require close supervision of the patients (who themselves are frequently prone to seizures and other severe medical problems) by staff, with the Addiction Techs being the front line staff in this process. It was my opinion based on my previous experience as Medical Director of two (2) other inpatient Substance abuse and Dually diagnosed units, that a person experiencing uncontrolled petit mal seizures would be a direct threat to the safety of themselves and the patients. Given my observation of Ms. Deas and evaluation of the circumstances surrounding her employment, as Medical Director and Attending Physician for the Strivers' program it was my opinion that Ms. Deas' continued employment

with the Strivers' program would be a direct threat to her and the patients' safety, and it was my duty to terminate her employment.

In my medical opinion and based on my experience as a Social Security Disability Examiner, Ms. Deas' seizures did not substantially limit her ability to work by limiting any of her major life activities. It was clear to me (from my interview of Ms. Deas) that Ms. Deas had been employed prior to Strivers and it was my opinion that she could preform [sic] other work. Ms. Deas' termination was based on my opinion that her uncontrolled seizures constituted a threat to the safety to herself and the patients that I would be admitting and be held responsible for on the Strivers's unit.

/s/ Strother P. Lindsey-Dixon
STROTHER P. LINDSEY-DIXON, M.D.

SWORN to and subscribed before me this 3rd day of September, 1996.

/s/ Edward Dixon
NOTARY PUBLIC

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

ALLISON DEAS

VERSUS

RIVER WEST, L/P, ALTERNATIVE ADDICTION TREATMENT CONCEPTS, INC., AND STROTHER P. LINDSEY-DIXON

NUMBER: 95-353

DIVISION: "B-1"

TRANSCRIPT OF THE DEPOSITION OF
STROTHER P. LINDSEY-DIXON

REPORTED IN THE ABOVE-ENTITLED AND NUMBERED CAUSE, BEFORE SHELLEY G. PAROLA, CERTIFIED COURT REPORTER, AUTHORIZED TO ADMINISTER OATHS OF WITNESSES, PURSUANT TO THE FOLLOWING STIPULATION:

REPORTED AT THE OFFICE OF:

ASSOCIATED REPORTERS, INC.

ONE AMERICAN PLACE, SUITE 1535

BATON ROUGE, LOUISIANA 70825

COMMENCING AT 2:45 P.M. ON SEPTEMBER 18, 1996

* * *

[p. 5] DR. STROTHER P. LINDSEY-DIXON

11934 COURSEY BLVD., BATON ROUGE, LOUISIANA, 70816, after having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. RASTANIS:

Q. Dr. Dixon, would you explain to me please why Ms. Deas was terminated.

A. Ms. Deas was terminated, in my medical opinion and my opinion as a former disability determinations officer, that her seizures were out of control, and I felt that it would be dangerous for her, and a danger to the patients that I intended to admit on the unit, to have her as an employee.

Q. What led you to believe that her seizures were out of control?

A. Because I saw her have a seizure during the orientation period.

Q. Okay, and tell me about that.

A. I was giving a presentation to the employees, and I noticed Ms. Deas turned her head very automatically to one side. And her head stayed that way for several seconds and the facial expression was blank.

I called her name, and she did not respond. Then she turned her [p. 6] head back around and I asked her if she were all right, and she said that she was. But then she asked me a question that had nothing to do with the content of the presentation.

Q. What did she ask?

A. She asked how did one evaluate a brain tumor.

Q. And did you answer her?

A. I told her that was not a question that was appropriate at the time.

Q. And how did she respond?

A. She didn't say anything.

Q. And you diagnosed her at that point in time?

A. I knew that something was wrong with Ms. Deas at that point in time.

Q. Okay. And when did you determine that was a seizure?

A. I felt it was a seizure at that point in time.

Q. Okay. So you made the decision that she had suffered a seizure in your presence?

A. Yes.

Q. What, a petit mal seizure?

A. A petit mal seizure, one does not necessarily lose consciousness, but awareness; and they don't have a general jerking and spasmodic reaction throughout the body, but they are not aware of their surroundings. And

* * *

[p. 11] Q. Okay.

A. They might hurt her physically and she not be aware of it.

Q. Okay. Well, tell me a place that she could work that would be safer than a hospital for someone who has seizures.

A. I could tell you a number of places.

Q. Please.

A. She could be a good receptionist.

Q. What would stop somebody from trying to take advantage of her there?

A. The kind of people that we admitted on the unit would be of higher risk kind of people who would do unusual acts, and they have done it in the past.

Q. Well what kind of people did you have on the unit?

A. We didn't have any persons on the unit at that time when she was hired.

Q. Well what kind of people did you have on the unit that would be more dangerous than your average person?

A. They would be people who were under the influence of substances, illegal substances as well as alcohol.

Q. Well it was my understanding that the people in your unit would not be under the influence.

A. Well they would come into the hospital to be detoxed, so they would still have some influence of

* * *

[p. 16] A. Other patients could have a seizure.

Q. Okay, what could Allison do if somebody was having a seizure?

A. She could report to the nurse that it was happening.

Q. Um-hmm.

A. She could be available to answer the phone if that were happening, to institute any other kind of medical connections that we needed to make for the hospital, or even help to – in the transportation of the patient to another unit if we had to.

Q. So it's your opinion, as a doctor, that somebody who suffers from seizures shouldn't work in a hospital at all?

A. I felt that the type of unit that we had and the number of employees that we had that Allison Deas, in her condition, could not be a value to the unit and could be a danger to herself.

Q. Because of these things that she was unable to do, right?

A. Because during the time of the seizures, she would be unable to help out with other patients and put herself at risk being in the presence of patients that could take advantage of her.

Q. Who sent out the job references for Ms. Deas?

* * *

[p. 26] Q. You had an obligation to tell the hospital what you were doing with your employees?

A. Yes.

Q. Okay. You worked as a Social Security disability examiner?

A. Yes.

Q. How many uncontrolled seizures a months does it require to be disabled under the Social Security rules?

A. Beg your pardon?

Q. Isn't it true that under the Social Security rules, two uncontrolled seizures per month qualifies as totally disabled?

A. Oh, I don't know.

Q. You testified that based on your experience as a Social Security disability examiner, Ms. Deas' seizures are 99. Do you know what the requirements are to be considered disabled under Social Security when it comes to seizures?

A. I know that having seizures, two in a day, is too many for the unit where Ms. Deas was going to be employed.

Q. How many would have been okay? If two a day is too many, could she have had one? Would that have been okay?

A. I feel that people having seizures on the unit that we had, that was not good. It was a dangerous thing.

* * *

[p. 27] Q. So any seizures, any amount of seizures, in your opinion, she would have had to have been let go?

A. I cannot postulate that. I only can say what I saw.

Q. I know. You say you saw two, and two is too many, right?

A. No, I saw one.

Q. You're aware of two?

A. Yes.

Q. Two is too many?

A. In the same day, yes.

Q. Okay. Well how about if she had only had one?

A. No, I'm not going to – I'm not going to say that. I said I let her go because I'm aware she had two seizures in the same day. That's too many.

Q. That's too many? Is one too many?

A. Two on the same day is too many.

Q. Would two in the same month be too many?

A. Two on the same day, in my opinion, is too many.

Q. Would two in the same month be –

MR. WALKER: Objection, I think you're badgering the witness. She answered your question.

MR. RASTANIS: No, she won't answer my question.

[p. 28] MR. WALKER: She answered your question.

MR. RASTANIS: No, she won't. She's being unresponsive.

A. Two in the same day in this situation was too many for me, and I felt it was dangerous for her and the unit.

BY MR. RASTANIS:

Q. Tell me what your experience is as a Social Security disabilities examiner. What do you know about seizures and Social Security disabilities?

A. I know that people can be in good control and have seizures once in six months, once in three months, once in several years and still be considered people with seizures.

Q. What's that have to do with Social Security disabilities?

A. Because a lot of times they come in with other conditions along with seizures, and I've seen them.

Q. What's the policy under the Social Security disability laws for seizures?

A. Again, for this situation –

Q. No, Ma'am, that's not what I'm asking about. You state in your affidavit –

A. That's right.

Q. – that in your opinion as a Social Security [p. 29] disability examiner –

A. Um-hmm.

Q. I want to know what now that you have, as a Social Security disabilities examiner, when it comes to seizures and disability?

A. Seizures are considered controlled when they are one or two a month, as you said.

Q. That they're controlled if you have one or two a month?

A. Yes, that's considered good control.

Q. Okay. And if you had somebody who had seizures that were in good control –

A. It depends on –

Q. May I finish please, Doctor.

A. I'm sorry.

Q. If somebody had one or two controlled seizures a month, would that have been okay for her to work in the unit?

A. Again, I feel that this is a job sensitive area, and in an area like we were working in, no, I do not think that people who have seizures on that unit would be a good idea.

Q. Even if they're controlled or not controlled, right?

A. Well there is good control, yes.

[p. 30] Q. Would people with seizures with good control have been allowed on the unit?

A. For instance, if a person was an airplane pilot, seizures are not acceptable.

Q. Okay, that's fine. But what I'm asking you is if she would have – if it had been one of these controlled situations like you just said –

A. No, seizures that are under good control.

Q. If her seizures would have been under good control –

A. Yes.

Q. – would she have been allowed to stay?

MR. WALKER:

It asks her to speculate. I object to the question.

MR. RASTANIS:

It's her affidavit she is speculating.

A. Again, I would feel that it's a job sensitive area, and I would say, no, it's not a good employee mix to have a person who has seizures once or twice a month working on such a unit. I feel that she would be at risk and the unit would be at risk.

BY MR. RASTANIS:

Q. Did you review any of the medical records that she had at the hospital?

* * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASE NO. 97-30154

ALLISON DEAS

Plaintiff-Appellant-
Cross Appellee

VERSUS

RIVER WEST, L.P.; ET AL.

Defendants

ALTERNATIVE ADDICTION TREATMENT CONCEPTS, INC.; STROTHER P. LINDSAY-DIXON

Defendants-Appellees

RIVER WEST, L.P.

Defendant-Appellee-
Cross Appellant

Appeal From The United States District Court
for the Middle District of Louisiana
Docket No. 95-353-B-1
Honorable Stephen C. Riedlinger,
Magistrate Judge, presiding

Original Brief of Allison Deas Plaintiff-Appellant-Cross Appellee as Appellant

---

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Cross Appellee, Allison Deas

* * *

SUMMARY OF THE ARGUMENT

Plaintiff proved in the trial court that she is "disabled" under the ADA, because even though she has a physical impairment that is not substantially limiting, the defendants regarded her as having a physical impairment that substantially limited her in the major life activities of seeing, hearing, speaking, and working.

Plaintiff shows that many cases interpreting the ADA and the Rehabilitation Act of 1973 have held that epileptic-type seizures constitute a disability *per se*. The undisputed facts in this case are that the plaintiff has occasional mild seizures and that she was discharged from her position because the defendants perceived her to be substantially limited because of this condition. Under these facts, the magistrate judge should have rendered summary judgment in favor of Miss Deas on the issue of liability, given the case law. The magistrate judge did not cite any statutory or case authority in erroneously ruling that epileptic-type seizures are not disabling *per se* as a matter of law.

Allison Deas further shows that the magistrate judge erred in ruling that a loss of consciousness or awareness does not substantially limit major life activities under the ADA. The summary judgment record shows that during plaintiff's alleged seizures at River West, Miss Deas reportedly could not visually recognize the person she was with, hear her name being called, or respond verbally. Plaintiff thus shows the defendants perceived her

as having substantial limitations in the major life activities of seeing, hearing, and speaking, which resulted in the defendants' decision to discharge Miss Deas from employment at River West Medical Center. Plaintiff shows that seeing, hearing, and speaking are all specifically listed as major life activities within the regulations interpreting the ADA. Plaintiff shows that her alleged losses of consciousness or awareness would be by definition and nature inclusive of the major life activities of seeing, hearing, and speaking, and that since the record shows that the defendants perceived Miss Deas to be substantially limited in these major life activities, and fired Miss Deas as a direct result of this perception, the magistrate judge erred in failing to grant plaintiff summary judgment on the issue of liability under these undisputed facts.

Plaintiff further shows that at the time of her discharge, the defendants also perceived her as having a physical impairment that substantially limited her in the major life activity of working. The record on summary judgment contains undisputed evidence that the defendants perceived that Allison Deas was significantly restricted in her ability to do a class of jobs or a broad range of jobs in various classes. Dr. Dixon testified that Miss Deas could not work in a substance abuse clinic or in a hospital. Miss Deas testified that both Dr. Dixon and Mrs. Miller informed her that they could not find a job to accommodate her anywhere else in the hospital. Thus plaintiff shows that conclusive evidence is in the record that shows the defendants perceived her as being substantially limited in the major life activity of working,

and that this perception was the direct cause for plaintiff's discharge, warranting summary judgment in favor of Miss Deas as to the defendants' liability under the ADA.

Plaintiff shows this Court that the record does not contain sufficient competent evidence to support any contention that her condition constituted a direct threat to her safety or that of the patients on the unit. The record further shows that despite their disclaimers to the contrary, the defendants made no attempt to provide Miss Deas with reasonable accommodation for her perceived disability before discharging Miss Deas from employment at River West Medical Center.

Plaintiff thus shows that under the undisputed facts, the magistrate judge erred in denying plaintiff's motion for summary judgment on the issue of liability, and further erred in granting summary judgment to the defendants ruling that plaintiff was not "disabled" under the ADA. Allison Deas shows that she rather than the defendants is entitled to judgment as a matter of law in this case.

MOTION FILED
JAN 2 5 1999

98-916

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

ALLISON DEAS,
Petitioner,

v.

RIVER WEST, L.P.; ALTERNATIVE ADDICTION TREATMENT CONCEPTS, INC.; and STROTHER P. LINDSEY-DIXON,
Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

MOTION FOR PERMISSION TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE EPILEPSY FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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January 25, 1999

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RIVER WEST, L.P.; ALTERNATIVE ADDICTION TREATMENT CONCEPTS, INC.; and STROTHER P. LINDSEY-DIXON,
Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

MOTION FOR PERMISSION TO FILE BRIEF *AMICUS CURIAE*
IN SUPPORT OF PETITIONER

The Epilepsy Foundation of America respectfully moves this Court for permission to file the accompanying brief *amicus curiae* in support of Petitioner. Petitioner granted written consent to the filing of this brief.[1] The Respondents have not given their

[1] Petitioner's written consent to the Epilepsy Foundation of America's filing of this brief has been filed with the Clerk of the Court.

consent to the filing of this brief. Leave of this Court is therefore requested under Rule 37.2(b) of this Court.

The interest of *amicus* is set forth below. The accompanying brief addresses issues of importance to people with epilepsy, seizure disorders and other disabilities. *Amicus* has reason to believe that its brief will supplement rather than reiterate the arguments made by Petitioner.

v

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

ALLISON DEAS,

Petitioner,

v.

RIVER WEST, L.P.; ALTERNATIVE ADDICTION TREATMENT CONCEPTS, INC.; and STROTHER P. LINDSEY-DIXON,

Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

BRIEF OF THE EPILEPSY FOUNDATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Epilepsy Foundation of America (also known as the Epilepsy Foundation) is a nonprofit corporation founded in 1968 to advance the interests of 2.5 million Americans with epilepsy and seizure disorders. Together with its affiliates throughout the nation, the Epilepsy Foundation maintains and disseminates up-to-

date, accurate information about epilepsy and seizures, promotes public understanding of the disorder, and supports research, professional awareness and advocacy on behalf of people with seizure disorders.

The term "epilepsy" evokes stereotyped images and fears which affect persons with this medical condition in all aspects of life, including, and especially, employment. Since its inception, the Epilepsy Foundation of America has stood against the stigma and estrangement associated with seizures and has supported the development of laws which protect individuals

from discrimination based on these stereotypes and fears. The Epilepsy Foundation is very concerned about the Fifth Circuit's interpretation of the Americans with Disabilities Act (ADA) and the negative implications this decision, if allowed to stand, will have for people with epilepsy, seizures, and other stigmatic disorders.

SUMMARY OF ARGUMENT

The Epilepsy Foundation respectfully urges this Court to grant the petition for certiorari filed by plaintiff. The ADA and its predecessor statute, the Rehabilitation Act of 1973, as amended, represent a major source of relief for people with disabilities like epilepsy and seizures seeking to become a gainful part of our society. When the ADA was drafted, legislators and advocates like the Epilepsy Foundation recognized that some people may be disabled, not by the limitations of their medical condition, but rather by the attitudes of others. Hence, the development of the "regarded as having a disability" prong of the statute. The Fifth Circuit's decision in this case effectively renders this aspect of the law meaningless for people who have an impairment that may not

actually substantially impair their daily living, and contravenes the intent and the plain language of the Americans with Disabilities Act.

ARGUMENT

I. HISTORICALLY, PEOPLE WITH EPILEPSY OR SEIZURES HAVE SUFFERED DUE TO SOCIETY'S FEARS AND MISUNDERSTANDING, ESPECIALLY IN THE AREA OF EMPLOYMENT.

Epilepsy is defined as chronic seizures.[2] Seizures are sudden, unexpected, uncontrolled episodes of excessive electrical discharges of brain cells, with associated sensory, motor and/or behavioral changes.[3] While most people think of seizures as people falling to the ground, losing consciousness, and convulsing, there are actually twenty different types of seizures. The effects of seizures, depending on seizure type, can range from minimal changes in sensation to loss of consciousness and convulsions. All seizures produce a temporary loss of conscious control of one's actions. In addition, there is usually a short period of recovery following seizures.

The twenty different types of seizures can be classified into two categories: partial seizures (seizures whose onset is limited to a part of one cerebral hemisphere) and generalized seizures (seizures which seem to involve the brain diffusively

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[2] Gastaut, H. Dictionary of Epilepsy. Part 1: Definitions (1973).
[3] Id.

from the outset). People with epilepsy may have more than one seizure type.

Partial seizures are the most common seizure type. This type of seizure activity is divided into those in which consciousness is maintained (simple partial seizures) but sensory and motor control is lost, and those in which consciousness also is impaired or lost (complex partial seizures).

A simple partial seizure implies that the person affected can still interact with the environment but the seizure will impose certain limitations on specific functions, such as speech or movement. A complex partial seizure is characterized by altered consciousness. There will be no loss of muscle tone in either type of seizure; that is, the person will not fall. In general, individuals with complex partial seizures cannot recall the details of the seizure episode, have impaired responsiveness, or cannot interact normally within the environment. During such seizures, an individual frequently manifests automatisms: repetitive complex motor activity that is purposeless, undirected, and inappropriate. Partial seizures may evolve into generalized seizures (secondarily generalized seizures) as the excessive electrical discharge spreads through the brain. Partial seizures, both complex and simple, are

the most difficult type of seizure to recognize. People unfamiliar with this seizure type may think the individual is daydreaming, drunk or on drugs.

The most commonly recognized generalized seizures are tonic clonic seizures (sometimes referred to as grand mal seizures) and absence seizures, also known as petit mal seizures. All generalized seizures are characterized by lapses of awareness. Tonic clonic seizures manifest as complete loss of muscle tone and massive muscle contractions, usually lasting between one and two minutes. Absence seizures produce short periods of blank staring or momentary changes from a normal to a blank facial expression. They characteristically last from ten to twenty seconds at most, and there is no loss of muscle tone. During the seizure, the person becomes completely unaware of the people and things around him, but quickly returns to full consciousness. There is no memory of the occurrence. These seizures happen so quickly that the person, and sometimes other people, may not notice that anything has happened, even though the person suffering the seizure has momentarily lost consciousness. Absence seizures may occur multiple times a day.

Since there are so many different types of seizures, which can stem from a variety of underlying causes (or even no known cause), epilepsy has been more accurately termed "the epilepsies."[4]

Although modern medicine now understands epilepsy to be a medical condition resulting from excessive electrical discharges in the brain, throughout history, the occurrence of seizures was considered to be a frightening and horrible disease, which afflicted both body and soul. People have thought that those with seizures were possessed by demons or were mentally ill.[5] These various beliefs about epilepsy led to horrible treatment of people with seizures, ranging from physical violence to extreme physical isolation such as incarceration in institutions. In fact, people who suffer from epilepsy or seizures were institutionalized until the latter half of this century.[6]

A survey conducted by the Epilepsy Foundation in 1996 showed that people with epilepsy or seizures identified as their primary concern "insufficient public awareness" about their

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[4] Epilepsy Foundation of America, How to Recognize and Classify Seizures & Epilepsy 11 (1992).
[5] Leon Eisenberg, Sociocultural Perspectives, in Epilepsy: A Comprehensive Textbook 41 (1997).

disorder.[7] A recent U. S. Centers for Disease Control conference on public health and epilepsy recommended that stigma and the factors which contribute to it be addressed as a top priority.[8] Some of the factors cited as perpetuating this stigma include a lack of public awareness about seizures and societal misperceptions about epilepsy and seizures. The broad and varied spectrum of disability among people with epilepsy and seizures was cited as another important factor contributing to the lack of public understanding and stigma, since the disorder can affect each individual so differently. Concerns about liability and a general fear of seizures also were identified as breeding the stigma surrounding seizures.[9] As demonstrated by the above data, stigma continues to be a problem for people with seizures.

Fortunately for people with epilepsy or seizures, modern laws such as the Rehabilitation Act of 1973[10] and the Americans with Disabilities Act[11] have endeavored to remedy the vast discrimination against them in all areas of their daily lives. While

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[6] Id.
[7] Report of the 1997 National Conference on Public Health and Epilepsy, Living Well with Epilepsy 11 (1997).
[8] Id. at 12
[9] Id.
[10] 29 U.S.C. §701 *et seq.*

these laws have not eradicated the fear and misunderstanding which persist in many minds, they do provide a remedy for victims of such discrimination.

Perhaps the most dramatic social consequence to the individual of having a diagnosis of a seizure disorder is its effect on obtaining and maintaining employment. Unfortunately, all too often people with epilepsy or seizures are denied employment or not trained for work they could do well and safely because of an unreasonable fear of their seizures. The working community has not welcomed with open arms persons with seizures; concern for safety and the risk of hiring people with seizures is the reason commonly given for not hiring people with seizures. A recent study on the economic costs of epilepsy documents that the indirect costs such as loss of employment and lowered earnings represent more than three quarters of the cost of the condition.[12]

The number of unemployed persons with epilepsy or seizures (among those fully able to work) remains disproportionately high. It is estimated that at least 25% of

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[11] 42 U.S.C. § 12101 *et seq.*

[12] Epilepsy Foundation, Epilepsy: A Report to the Nation 7 (1999).

working-age people with epilepsy or seizures are unemployed.[13] Among those whose seizures are poorly controlled, the unemployment rate is even higher. Sixty-four percent of individuals with epilepsy or seizures indicated in a survey that they were unemployed as a direct result of their seizures.[14] Frequency of seizures and attitudes of employers appear to be the major factors in the high unemployment rate for this population.[15]

II. CONGRESS EXPLICITLY STATED THAT THE PURPOSE OF THE "REGARDED AS" PRONG OF THE ADA IS TO COMBAT THE IRRATIONAL FEARS AND MISPERCEPTIONS OF EMPLOYERS AND OTHERS.

The Americans with Disabilities Act (ADA) was enacted as a comprehensive anti-discrimination statute to further expand the scope of protection offered by the Rehabilitation Act.[16] The legislative history of the ADA clearly indicates that Congress intended the "regarded as" prong of the definition to cover individuals who fall victim to others' fears and misinformation

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[13] Id.
[14] Id.
[15] Id. See also, Hicks, R.A. & Hicks, M.J., Attitudes of Major Employers Toward the Employment of People with Epilepsy: A 30-Year Study. 32(1) Epilepsia, 86-88 (1991).

about their disorder,[17] and is replete with examples of the history of discrimination based upon erroneous information.[18] In fact, this Court's opinion in School Board of Nassau County v. Arline,[19] a Rehabilitation Act case, is cited in the legislative history as support for the "regarded as" test:

> The Court noted that Congress included this third prong because it was as concerned about the effect of an impairment on others as it was about its effect on the individual. As the Court noted, the third prong of the definition is designed to protect individuals who have impairments that do not in fact substantially limit their functioning.[20]

The legislative history is clear that the purpose of the "regarded as" test is to provide an avenue of redress for individuals who suffer from stigmatic conditions which are viewed by others as disabilities, but which do not actually substantially limit a major life activity.[21] Congress intended that any person

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[16] H. Rep. No. 101-485 pt. 2 at 47, 48 (1990). The definition of who is disabled is practically identical to the definition of a "handicapped individual" included in the Rehabilitation Act.

[17] H. Rep. No. 101-485 pt 2 at 53; H. Rep. No. 101-485 pt. 3 at 30 (1990).

[18] S. Rep. No. 101-116 at 23, 24 (1989).

[19] School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987).

[20] S. Rep. No. 101-116 at 23; H. Rep. No. 101-485 pt. 3 at 30.

[21] H. Rep. 101-485, Pt. 2 at 53. The legislative history states, "For example, severe burn victims . . . are viewed by others as having an impairment which substantially limits some major life activity and are

who is discriminated against due to another's negative attitudes about that person's impairment is covered under this prong of the definition.[22] Congress recognized that some employers may refuse to hire someone because of the their own belief about the disorder:

> . . . if an employer refuses to hire someone because of the employer's perception that the applicant had a disability which prevented that person from working, that person would be covered under the third prong.[23]

In addition, the House Committee on Judiciary described the purpose of the "regarded as" test as follows:

> . . . if a person is disqualified on the basis of an actual or perceived physical . . . condition, and the employer can articulate no legitimate job-related reason for the rejection, a perceived concern about employing persons with disabilities could be inferred and the plaintiff would qualify for coverage under the 'regarded as' test.[24]

Congress recognized that employer attitudes and fears were largely responsible for the exclusion of the disabled from employment opportunities and the legislative history is decisive

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discriminated against on that basis. Such individuals would be covered under the Act under the third prong of the definition."

[22] Id.

[23] S. Rep. No. 101-116 at 24.

that people who are perceived as having stigmatized conditions be assured protection under the ADA.

A. The Fifth Circuit's Decision Renders the "Regarded As" Prong of the ADA Meaningless.

The Fifth Circuit decision, as it now stands, decimates the meaning and purpose of the "regarded as" test. Many people's seizures are well-controlled or they are very minor and brief in duration; thus, they do not consider themselves disabled in any manner. However, these individuals may need the protection of the ADA when their employers learn that they experience seizures. This decision, if allowed to stand, denies people who are perceived as disabled protection under the ADA, in direct contravention of congressional intent.

The Supreme Court recognized in the Arline case the disabling effects of others' perceptions of an impairment, and the need for a factual inquiry in order to protect persons who are "regarded as" disabled.[25] As this Court aptly stated, "Such an inquiry is essential . . . to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to

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[24] H. Rep. No. 101-485 pt. 3 at 30-31.

such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks."[26] The final determination of Ms. Deas' entitlement to ADA protection can only be made after a factfinder has an opportunity to consider the evidence presented. If the Fifth Circuit's opinion is allowed to stand, it could make it possible for any employer to fire someone based on their fear about the disorder, and then to escape all liability by stating in an affidavit that they did not regard the individual as being substantially impaired by the condition. The law intended decisions about whether an individual with a disability is able to perform the essential requirements of a job to take place after a full fledged factual determination of the particular job requirements and the impact of that individual's particular disability on that job. The fact that an individual was terminated as soon as the employer discovered that he or she had seizures raises a presumption that the employer regarded the individual as having a substantially limiting impairment, and is a material question of fact that requires analysis. Allowing employers to fire people because they have seizures, and avoid liability by later

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[25] Arline at 287.
[26] Id.

statements that the employer did not regard the individual as being substantially impaired flies in the face of common sense. It also circumvents the very factual analysis of the particular job requirements, the ability of the individual, and the perceptions of the employer at the time the adverse decision was made that the ADA intended to occur. Employers cannot be allowed to circumvent the anti-discrimination mandate of the ADA in this fashion, thus slamming the door to claimants who are victimized solely by an employer's ignorance, fear and misunderstanding of their medical condition.

III. PEOPLE WITH SEIZURES AND OTHER STIGMATIZED CONDITIONS WILL SUFFER IRREPARABLY FROM THE FIFTH CIRCUIT'S DECISION.

The Epilepsy Foundation of America urges this Honorable Court to grant certiorari in this case, as its implications for people with seizures extend far beyond the Fifth Circuit. People with seizures, who have long been treated adversely because of their medical condition, will once again have no redress under the Catch-22 created by the lower court's narrow interpretation of the law. Specifically, those whose seizures are well-controlled or whose seizures are minor will not be able to access the ADA's

protection, despite the fact that they didn't get the job or they lost a job because of the same condition. Such individuals, who may not consider themselves disabled, are still entitled to the protection of the ADA because of the treatment they receive from others. The decision of the Fifth Circuit will have the very real effect of perpetuating abusive behavior toward those who look funny, act weird, or fall to the ground and shake. This is not the message intended by the Americans with Disabilities Act.

CONCLUSION

People with epilepsy and seizures want to work. Most of them are fully able to do so, with some accommodation to their condition, and would like the opportunity to be gainfully employed. If such individuals are not given the chance, because an employer is afraid to hire them, or believes without basis in fact that the individual cannot work because of a medical condition, our society has not moved forward as the ADA intended. The beauty of the ADA is that it provides opportunities for the disabled (and those regarded as disabled, or who have a record of a disability) where the door had previously been locked. The decision of the Fifth Circuit is devastating to all such individuals who are regarded as disabled by an employer. We respectfully

request that this Court grant certiorari in this case, and thereby take the first step to ensure that Ms. Deas, and others like her, be given an opportunity to present their cases when discrimination has occurred. Do not let the Fifth Circuit's decision stand as a permanent obstacle to this population which so richly deserves this opportunity.

Respectfully
submitted,

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January 25, 1999

(5)

No. 98-916

Supreme Court, U.S.
FILED
FEB 1999
CLERK

In The

Supreme Court of the United States
October Term, 1998

ALLISON DEAS,

Petitioner,

v.

RIVER WEST, L.P.; ALTERNATIVE ADDICTION TREATMENT CONCEPTS, INC.; and STROTHER P. LINDSEY-DIXON,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF RESPONDENT, RIVER WEST, L.P. IN OPPOSITION TO MOTION OF EPILEPSY FOUNDATION TO FILE AMICUS CURIAE BRIEF

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BRIEF IN OPPOSITION TO MOTION OF
EPILEPSY FOUNDATION TO FILE AMICUS CURIAE BRIEF

MAY IT PLEASE THE COURT:

The Epilepsy Foundation of America ("EFA") has filed a "Motion For Permission To File Brief Amicus Curiae" in support of the petitioner's application. Respondent, RIVER WEST, L.P., strenuously opposes the filing of such a brief, for the reasons set forth below:

I. THE PROPOSED AMICUS CURIAE BRIEF IGNORES THE RECORD AND DISTORTS THE ISSUES IN THIS CASE.

A substantial portion of the proposed brief is devoted to a discussion of epilepsy generally. This ignores the fact that *in this case* there was no evidence of any medical diagnosis whatsoever, much less to say nothing of a diagnosis of "epilepsy." The Fifth Circuit Court of Appeal noted this at footnote 17 of its opinion (Deas' App. p. 14). The court noted in the opinion itself that, "'[s]eizures' is quite simply too broad and too amorphous a term to be useful in describing a class of impairments that is to receive *per se* treatment[17]".

In the footnote to the foregoing statement, the court discusses medical aspects of "seizures" generally. It was the conclusion of the court, with which respondent agrees, that *per se* disability status should not be afforded "seizures." Nowhere in the record of this case is there any evidence of any medical diagnosis whatsoever, and certainly no medical diagnosis of "epilepsy."

As such, the emphasis of the EFA is misplaced, and its brief is not applicable to this case and would confuse and distort the issues.

II. THE PROPOSED AMICUS CURIAE BRIEF ASKS THIS COURT TO DECIDE THIS CASE ON THE BASIS OF MATTERS NOT MADE PART OF THE RECORD.

The brief's discussion of epilepsy and seizures simply constitutes evidence in the nature of expert testimony, not subject to cross examination, which was not adduced by the plaintiff/petitioner in the trial court. Nor, it is submitted, could such testimony been adduced, for the reasons outlined in Section I of this brief in opposition. Neither did plaintiff attempt to introduce expert testimony about plaintiff's condition and its apprehension by the general public, nor was the reference made to any textual materials or learned treatises with the same information as now presented in this brief. Inasmuch as the considerations placed before this court by the EFA constitute expert opinion, they should not be considered, since plaintiff could have sought to introduce expert opinion at the level of the trial court, but did not.

Inasmuch as the information contained in the proposed amicus brief attempts to characterize plaintiff's condition as something which it is not, and to introduce further evidence about that condition and its apprehension by the public, same constitutes additional evidence outside the record, introduced for the first time before this court, and thereby further distorts the issues in the record in this case. The brief should not be considered for those reasons.

III. SUBSTANTIVELY, THE BRIEF IS A MERE REITERATION OF PETITIONER'S POSITION.

Insofar as the proposed amicus brief does discuss those issues germane to this case, it merely repeats the position of the petitioner and adds nothing contributory. Essentially, the EFA argues, as Deas does, that a person with seizures is not perceived as impaired but disabled, and further that the

fact of the termination of an individual with seizures "raises a presumption that the employer regarded the individual as having a substantially limiting impairment . . ."

These arguments were raised by petitioner and responded to by this respondent, and their assertion by the EFA contributes nothing to the resolution or decision of this case.

Moreover, the EFA's position appears to be that "The final determination of Ms. Deas' entitlement to ADA protection can only be made after a fact finder has an opportunity to consider the evidence presented (Brief p. 11)". In fact, all of the evidence on the question was presented at the trial court level and decided by the court in a summary judgment setting, in a case which was to be tried to the court without a jury. The EFA's position adds nothing to this case.

IV. CONCLUSION.

For these reasons, then, the motion of the EFA to file an amicus curiae brief should be denied.

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Supreme Court, U.S.
FILED
FEB 12 1999
CLERK

(6)

No. 98-916

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

Since the submission of the petition in the pending case, this Court has granted writs of certiorari in three other cases in which the questions presented, like the one here, involve the interpretation of the protection accorded persons who are regarded by their employers as disabled under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101-12213 (1998).[1] Given the complementary

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[1] *See Murphy v. United Parcel Service, Inc.*, No. 97-1992, 1999 WL 5329 (U.S. Jan. 8, 1999); *Sutton v. United Air Lines, Inc.*, No. 97-1943, 1999 WL 5326 (U.S. Jan. 8, 1999); *Albertson's, Inc. v. Kirkingburg*, No. 98-591, 1999 WL 5332 (U.S. Jan. 8, 1999).

yet unique issues raised in this case about the proper analysis of claims brought by persons who were erroneously regarded as having an impairment that substantially limits a major life activity, the Petitioner requests that the Court grant review of this case and consolidate it with the other three cases under review or, in the alternative, hold this case pending the disposition of the other three cases.[2]

This case warrants review because the Fifth Circuit, like several other circuit and district courts, substituted its assessment of an employee's impairment for that of the employer,[3] in derogation of the ADA. In enacting the ADA, Congress sought to protect employees who may lack an impairment that substantially limits a major life activity but are denied an employment opportunity because their employers regarded them as having such an impairment. *School Board of Nassau County v. Arline*, 480 U.S. 273, 279 (1987). The Respondent, River West, discharged Ms. Deas because it believed she suffered from seizures and that those seizures impaired her ability to

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[2] The Respondents' opposition to this petition, in substantial part, rests upon the claim that the lower court decisions are factually unique and, therefore, inappropriate for review. *See* Brief of Respondent, River West, L.P. in Opp. to Pet. for Writ of Cert. at 1, 2; Brief of Alternative Addiction Treatment Concepts, Inc. and Strother P. Lindsey-Dixon in Opp. to Pet. for Writ of Cert. at 1. While this case, like most before this Court, is set in a particular factual context, the question presented raises a singular legal issue: Whether the Fifth Circuit erred by substituting its judgment for that of the employer in determining whether Ms. Deas was regarded as having an impairment that substantially limited a major life activity. If anything, the facts of this case add flesh to the bones of this legal issue, enhancing, rather than diminishing, the suitability of this case for review.

[3] *See e.g., Wooten v. Farmland Foods*, 58 F.3d 382, 386 (8th Cir. 1995); *Welsh v. City of Tulsa*, 977 F.2d 1415, 1419 (10th Cir. 1992); *Joyce v. Suffolk County*, 911 F. Supp. 92, 96-98 (E.D.N.Y. 1996); *Castorena v. Runyon*, No. 94-1456-PFK, 1994 WL 240762, at *4 (D. Kan. May 23, 1994) (App. pp. 17a-32a.)

remain alert and conscious throughout her work. (*See* Lindsey-Dixon Dep., App. pp. 3a-13a.) As such, River West believed that awareness constituted a major life activity. (*See* Lindsey-Dixon Dep., App. pp. 2a-4a.) Since Ms. Deas was treated as though her seizures substantially limited a major life activity, she qualified for protection under the ADA. The Fifth Circuit, however, held that Ms. Deas was not covered by the ADA because, notwithstanding the employer's perception, the court found that the ability to remain alert and conscious did not qualify as a major life activity *per se*. *Deas v. River West, L.P.*, 152 F.3d 471, 479 (5th Cir. 1998). While Ms. Deas's employer harbored a perception on the basis of which it terminated her employment, the Fifth Circuit second-guessed the employer several years after the fact by holding that the perception could not serve as a basis for protection under the ADA.

Since Congress intended to protect employees from being denied employment because of stereotypes and unfounded perceptions, the employer's conduct and beliefs, not a court's subsequent assessment of them, should be dispositive of whether protection under the ADA is available. The approach taken by the Fifth Circuit, and by the other courts that subscribe to it, impermissibly withholds protection simply because a court finds, after the fact, that the stereotypes on which the employer relied to deny an employment opportunity were not factually sufficient to qualify as an impairment of a major life activity. Congress intended otherwise and this Court's jurisprudence dictates a different result.

ARGUMENT

The record is clear that River West regarded Ms. Deas as having an impairment which substantially limited a major life activity. As such, Ms. Deas should have been accorded protection under the ADA. Instead, the Fifth Circuit held that the grounds on which Ms. Deas was discharged were not cognizable under the ADA. Although Ms. Deas's employer viewed her as disabled and, on the basis of that perception, it terminated her employment, the Fifth Circuit rejected her claim because it found the major life activity on which the employer relied did not qualify for protection. While River West discharged Ms. Deas because it believed her seizures substantially limited a major life activity, the Fifth Circuit disagreed with that belief and, accordingly, denied her protection. In enacting the ADA, however, Congress intended to protect employees from all stereotypes about disabilities, regardless of whether they conform to a legal interpretation of the disability laws. The stereotype on which River West relied to discharge Ms. Deas is no less pernicious simply because, in a court's subsequent judgment, the grounds for the stereotype failed to qualify as a disability. The discharge is nonetheless covered by the ADA.

Ms. Deas suffers from a seizure disorder which periodically causes her to become momentarily less alert than people without the disorder. (*See* Deas Dep., App. pp. 14a-16a.) Based upon experience with Ms. Deas from one day of work, River West discharged her. (*See* Lindsey-Dixon Dep., App. pp. 1a-2a, 4a-5a, 9a-10a.) It concluded that her seizures, which caused her to lose consciousness for "several seconds" at a time, precluded her from working effectively. (*See* Lindsey-Dixon Dep., App. pp. 3a-13a.) During deposition, River West acknowledged that it had discharged Ms. Deas because of her seizures. *Deas,* 152 F.3d at 475-76. River West also expressed the view that the seizures substantially affected Ms. Deas's awareness and that it regarded awareness as a major life

activity.[4] (See Lindsey-Dixon Dep., App. pp. 1a-13a.) Because Ms. Deas's seizures do not in fact substantially limit a major life activity, she did not have an impairment that in itself would have qualified for protection under the ADA. But since River West discharged Ms. Deas because it regarded her as having an impairment that substantially limited a major life activity, she nonetheless claimed protection under the ADA. Accordingly, Ms. Deas alleged in her complaint that her employer had regarded her as having an impairment that substantially limited the major life activities of seeing, hearing, speaking and working. *Deas,* 152 F.3d at 479. On appeal, the Fifth Circuit identified as a primary issue before it whether awareness qualified as a major life activity.[5] *Id.* Since River West had regarded awareness as a major life activity, the Fifth Circuit improperly reassessed and, ultimately substituted its judgment for, the views of the employer.

The Fifth Circuit began its analysis of this issue by correctly stating that

> [u]nder the 'regarded as' prong, the disability status of the plaintiff turns not on the plaintiff's physical condition, but rather on how the plaintiff was perceived and treated by those individuals alleged to have taken discriminatory action.

Id. at 476. The court departed from this course, however, when it rejected awareness as a major life activity. *Id.* at 471. Rather than accepting the employer's perception that awareness was a major life activity, the court engaged in its own assessment. Citing no legal or medical authority,

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[4] There is also no dispute that River West regarded Ms. Deas's seizures as an impairment. *Deas,* 152 F.3d at 476.

[5] The Court of Appeals also considered whether there was sufficient evidence that River West regarded Ms. Deas as substantially limited in other major life activities. *Id.* at 480-82. The Court did not have occasion to substitute its judgment for that of the employer in assessing these other major life activities and thus the Petitioner does not seek review of them.

the Fifth Circuit simply concluded that since "awareness" was "not susceptible to any precise definition[,]" it would not recognize awareness as a major life activity *per se*. *Id.* In doing so, the court pursued the wrong inquiry The only question properly raised was whether the employer in this case regarded "awareness" as a major life activity. Since River West clearly answered that question in the affirmative, no further inquiry was warranted on this record. The Fifth Circuit was not called upon to determine whether "awareness" is, in all circumstances, a major life activity, only whether River West regarded it as such in this case.

By its very nature, the protection accorded by the ADA to employees who are regarded as having an impairment of a major life activity sweeps within its ambit persons who have been subject to stereotypes that may bear little or no relation to reality. *See Arline*, 480 U.S. at 279. It would defeat the purpose for which Congress enacted this protection to limit its scope to impairments which, viewed rationally, would substantially limit a major life activity. Such constraints may be warranted in construing the protections accorded persons who claim they have a real impairment that actually limited a major life activity. *See* 29 C.F.R. app. § 1630.2(j) (1998); Equal Employment Opportunity Commission, *Equal Employment Opportunity Commission Compliance Manual 2*, EEOC Order 915.002, § 902 (1995) at 902-18 to 902-20. In this case and others like it, however, where the disability is created by the employer's perceptions, nothing more than the presence of the stereotypes and personnel action based on them should suffice to warrant protection by the ADA.

Congress could not have been more clear in expressing its intention to protect employees from stereotypes about disabilities that their employers may harbor, regardless of whether the employees in fact have an impairment that substantially limits a major life activity. The House

Committee on the Judiciary explained that the protection accorded to employees because they are regarded as having an impairment is necessary because "society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment." H.R. Rep. No. 101-485 (III), at 30 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 453 (quoting *Arline*, 480 U.S. at 284). In Report language that expressly repudiates the approach undertaken by the Fifth Circuit below, Congress expressed its intention to provide protection,

> whether or not the employer's perception was shared by others in the field and *whether or not the person's physical or mental condition would be considered a disability under the first or second part* of the definition.

H.R. Rep. No. 101-485 (III), at 30 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 453 (emphasis added). Accordingly, Congress intended to extend protection to persons who were denied employment opportunities because of their employers' perceptions, regardless of whether those perceptions would have qualified under the other definitions of disability under the Act.[6] As someone whose employer regarded her as having an impairment that substantially limited a major life activity, Ms. Deas was entitled to protection under the ADA.

The Senate echoed this intention espoused by the House, explaining that the need for this protection of persons regarded as having an impairment is especially

---

[6] The ADA defines disability as the satisfaction of one or more of the following criteria:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2) (1998).

heightened for persons, like Ms. Deas, who have seizure disorders.

> [T]he third prong of the definition is designed to protect individuals who have impairments that do not in fact substantially limit their functioning. . . . This . . . prong is *particularly important for individuals with stigmatic conditions* that are viewed as physical impairments but do not in fact result in a substantial limitation of a major life activity. . . . [An] important goal of the third prong of the definition is to ensure that persons with *medical conditions that are under control*, and that therefore do not currently limit major life activities, are not discriminated against on the basis of their medical conditions. For example, *individuals with . . . epilepsy are often denied jobs for which they are qualified. Such denials are the result of negative attitudes and misinformation.*

S. Rep. No. 101-116, at 23-24 (1989), H. Rep. No. 101-485(II), at 53 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 335 (emphasis added). The circumstances in which Ms. Deas was discharged, therefore, present the classic case which the Senate contemplated in passing the ADA.

This legislative history confirms that Congress intended to afford protection under the ADA against employer stereotypes, regardless of whether those stereotypes would have served as a basis to qualify under either of the other two definitions of disability. Accordingly, the stereotypes harbored by River West here should have sufficed below to warrant protection for Ms. Deas.

CONCLUSION

For the reasons set forth above and in the petition, Allison Deas respectfully requests that the Court grant review and either consolidate this case with the three other similar cases that the Court has recently taken or hold this case pending disposition of those other cases.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

No. 95-353-B-A

ALLISON DEAS

versus

RIVER WEST, L.P.,
ALTERNATIVE ADDICTION TREATMENT CONCEPTS, INC.,
STROTHER P. LINDSEY-DIXON AND PEGGY JARREAU

EXCERPTS FROM THE DEPOSITION OF STROTHER P. LINDSEY-DIXON TAKEN ON SEPTEMBER 18, 1996

* * * *

[5] DR. STROTHER P. LINDSEY-DIXON, 11934 COURSEY BLVD., BATON ROUGE, LOUISIANA, 70816, having been first duly sworn, was examined and testified as follows:

EXAMINATION BY MR. RASTANIS:

Q. Dr. Dixon, would you explain to me please why Ms. Deas was terminated.

A. Ms. Deas was terminated, in my medical opinion and my opinion as a former disability determinations officer, that her seizures were out of control, and I felt that it would be dangerous for her, and a danger to the patients that I intended to admit on the unit, to have her as an employee.

Q. What led you to believe that her seizures were out of control?

A. Because I saw her have a seizure during the orientation period.

Q. Okay, and tell me about that.

A. I was giving a presentation to the employees, and I noticed Ms. Deas turned her head very automatically to one side. And her head stayed that way for several seconds and the facial expression was blank. I called her name, and she did not respond. Then she turned her [6] head back around and I asked her if she were all right, and she said that she was. But then she asked me a question that had nothing to do with the content of the presentation.

Q. What did she ask?

A. She asked how did one evaluate a brain tumor.

Q. And did you answer her?

A. I told her that was not a question that was appropriate at the time.

Q. And how did she respond?

A. She didn't say anything.

Q. And you diagnosed her at that point in time?

A. I knew that something was wrong with Ms. Deas at that point in time.

Q. Okay. And when did you determine that was a seizure?

A. I felt it was a seizure at that point in time.

Q. Okay. So you made the decision that she had suffered a seizure in your presence?

A. Yes.

Q. What, a petit mal seizure?

A. A petit mal seizure, one does not necessarily lose consciousness, but awareness; and they don't have a general jerking and spasmodic reaction throughout the body, but they are not aware of their surroundings. And [7] they may move their head or face in a certain way for a certain length of time and not be aware of their environment for a few seconds.

Q. And you believe this is what was happening to Allison?

A. Yes.

Q. That she was not aware of her surroundings?

A. Yes, at that point in time.

Q. Okay. Now would you explain to me what you consider basic life or major life functions. What's a major life function to you?

A. That one can walk and talk, that one can stretch and lift within reason, can climb, those kind of activities.

Q. How about being aware of your surroundings?

A. Yes, indeed.

Q. So, being able to be aware of one's surrounding you would consider a major life activity?

A. I would.

Q. And when Allison was unable—in your opinion, what you perceived, is she was unable to be aware of her surroundings; is that correct?

A. Yes.

Q. So she had an impairment of a major life function in your opinion; isn't that correct?

[8] A. Well, she had an impairment, yes.

Q. Of a major life activity, being aware of your surroundings?

A. Being aware of one's surroundings.

Q. You say in your affidavit that you've recently done, it says, in my medical opinion and based on my experience as a Social Security disability examiner, Ms. Deas' seizures did not substantially limit her ability to work by limiting any of her major life activities. It seems inconsistent with what you just said. Can you explain that?

A. Well, in general I was speaking of being physically capable of walking, stretching, those kinds of activities.

Q. But you don't think that she was capable of always having awareness, right?

A. I do not think she was capable of always having awareness.

Q. Okay. Did you tell Mr. Ferrelli that you were uncomfortable with somebody having seizures on your unit?

A. I don't think I told Mr. Ferrelli that, no.

Q. Had you told anybody that you were uncomfortable with it?

A. I told Ms. Miller I felt it was dangerous with someone with seizures out of control to work on such a [9] unit, yes.

Q. What makes you believe that her seizures were out of control?

A. Because she had two in one day.

Q. And how do you know that?

A. Because one of the employees came to me very reluctantly and unsolicited and told me that he hated to say this, but felt that it was dangerous. And he wanted me to know that she had had a seizure in his presence.

Q. And how did he explain it to you?

A. That she lost awareness and that he called her name and she did not respond, and that went on for quite sometime. And then he told—he asked her, do you know that you had a seizure. And she responded that she knew that she had a seizure disorder, yes.

Q. So now you're saying that he asked her about it and she admitted it now?

A. Yes.

Q. He told you that?

A. Yes.

Q. And who was that?

A. Lane Douglas.

Q. What kind of qualifications does Lane Douglas have, medically speaking?

A. He's a substance abuse counselor, licensed [10] substance abuse counselor.

Q. What kind of medical qualifications or trainings does he have?

A. I cannot speak for that. I never trained a licensed substance abuse counselor, per se.

Q. Well I'm curious. You know, you took his word for it that she had a seizure, right?

A. Yes.

Q. What qualifications did he have that made you feel comfortable in his diagnosis of her having a seizure?

A. He has had a great deal of experience working on susbtance abuse areas.

Q. Um-hmm.

A. And those people have seizures quite often.

Q. People that abuse substances have seizures?

A. Yes.

Q. How was she a danger to herself?

A. She was a danger to herself in that she would be around other people who may try to manipulate her one way or the other.

Q. How so?

A. Physically.

Q. What do you mean?

A. Well, they could approach her sexually and she'd not be aware of it.

[11] Q. Okay.

A. They might hurt her physically and she not be aware of it.

Q. Okay. Well, tell me a place that she could work that would be safer than a hospital for someone who has seizures.

A. I could tell you a number of places.

Q. Please.

A. She could be a good receptionist.

Q. What would stop somebody from trying to take advantage of her there?

A. The kind of people that we admitted on the unit would be of higher risk kind of people who would do unusual acts, and they have done it in the past.

Q. Well what kind of people did you have on the unit?

A. We didn't have any persons on the unit at that time when she was hired.

Q. Well what kind of people did you have on the unit that would be more dangerous than your average person?

A. They would be people who were under the influence of substances, illegal substances as well as alcohol.

Q. Well it was my understanding that the people in your unit would not be under the influence.

A. Well they would come into the hospital to be detoxed, so they would still have some influence of [12] illegal drugs and alcohol, even when they came to the unit.

Q. So you had people in the unit—these people weren't restrained when they were under the influence?

A. Oh, no.

Q. You had people on the unit that were under the influence of some kind of substance, illegal substance or legal substance, that was not restrained at all? They were free to roam around?

A. They were free to roam around, yes.

Q. Did you ever have an incident where any of your employees were attacked sexually?

A. Sexually innuendos, but not physically attacked, no.

Q. Besides somebody trying to take advantage of her sexually or to take—to physically hurt her, what other kind of danger was she in to herself?

A. Substance abuse technicians would take patients, as a group, out to smoke. They would take them to the park.

Q. Take them where?

A. To the park for walks in the park near the hospital. If she were in a place where we could not get appropriate medical attention to her that she might need—she might hit her head or anything of that nature.

Q. Did you have regular outings in the substance abuse [13] unit?

A. Yes, we did.

Q. Did you take people out by vehicle, patients?

A. We would take them if they—we would go and pick them up if we needed do that, or at times we would take them to their homes if we needed to do that.

Q. I'm talking about taking them out for activities.

A. We did not take them out for group activities while the unit was open, no, not in vehicles as a group.

Q. Was it a requirement that the addiction techs be able to do CPR?

A. Yes, the hospital required that.

Q. And did Allison go through the training for CPR?

A. I don't know. I don't remember.

Q. Let me show you a document I got from you or from your lawyer. I'll label this as Dixon Number 1. Did that come out of Allison's personnel file?

A. I don't know.

Q. Did you review Allison's personnel file?

A. Basically I did, yes.

Q. Okay. Well, that was provided to me by your attorney. It seems to indicate that Allison went through CPR training. Is that what you see?

A. I'm not surprised that she did.

Q. Okay. So if she went through CPR training, she was [14] trained in CPR. Is that what that certificate means?

A. That's what it means.

Q. Okay. I'm looking at some responses that you had in your answer to the original suit. It says under affirmative defenses, plaintiff was terminated because it was determined that based on her performance, she was unable to meet the established work standards for an addiction tech in the following particulars: An addiction tech should be required to, colon, one, administer CPR to patients in emergency situation; two, assist patients with activities of daily living, supervisor of groups of patients, escort patients to scheduled activities off the unit, parentheses, which often requires driving, closed parentheses; three, assisting in crisis intervention with patients including restraints, seclusion according to hospital policy and procedure.

Now, I'm going to start—it says, plaintiff was terminated because it was determined that based on her per-

formance, she was unable to administer CPR. Explain that to me.

A. I felt that if Ms. Deas had a seizure, she could not administer CPR to anyone.

Q. And that was based on her performance?

A. I felt that if Ms. Deas had a seizure and if it was [15] necessary to help another patient, she would not be available to do that.

Q. How many people are on a unit at any one time?

A. Oh, on an average it's 22, thereabouts.

Q. Employees on a unit?

A. Employees?

Q. Um-hmm.

A. It depended on the shift.

Q. Explain to me.

A. During the night shift, we don't have as many employees on the unit because we don't have as many activities on the unit as during the day.

Q. So how many would be on the night shift?

A. Possibly a nurse and a substance abuse tech.

Q. On day shift?

A. Depending on what period of the day, possibly a registered nurse, an LPN, a couple of techs in the morning and a receptionist.

Q. And in what ways was Allison a danger to the people on the unit?

A. I felt that if she had a seizure, during that time she could not be available to help other patients if we needed her to do that.

Q. What kind of situation would arise on that unit that—

[16] A. Other patients could have a seizure.

Q. Okay, what could Allison do if somebody was having a seizure?

A. She could report to the nurse that it was happening.

Q. Um-hmm.

A. She could be available to answer the phone if that were happening, to institute any other kind of medical

connections that we needed to make for the hospital, or even help to—in the transportation of the patient to another unit if we had to.

Q. So it's your opinion, as a doctor, that somebody who suffers from seizures shouldn't work in a hospital at all?

A. I felt that the type of unit that we had and the number of employees that we had that Allison Deas, in her condition, could not be a value to the unit and could be a danger to herself.

Q. Because of these things that she was unable to do, right?

A. Because during the time of the seizures, she would be unable to help out with other patients and put herself at risk being in the presence of patients that could take advantage of her.

* * * *

[22] Q. What kind of seizure do you call that? You just referred to it as a general seizure?

A. It's a general seizure, yes.

Q. So is that the two different types of seizures?

A. It can get—a lot of times it can be referred to as a jacksonian seizure.

Q. Okay.

A. Or grand mal seizure.

Q. And did you have any idea what was causing her seizures?

A. No, I did not.

Q. Did you ever ask her?

A. No, I did not.

Q. Did you ever ask her if she was on medication?

A. No, I did not.

Q. You just assumed they were out of control?

A. If I saw her have a seizure and then another employee told me that she—he witnessed a seizure in the same day, I felt they were out of control, yes.

Q. You never talked to her about any medicine she was [23] taking?

A. No, I did not.

Q. Didn't ask her if she was being treated by a doctor?

A. No, I did not. I did overhear her say that she was being treated by a doctor.

Q. When did she—

A. Yes, the same day.

Q. When?

A. She was talking to some employees and I heard her.

Q. Where was that?

A. On the unit.

Q. Who was she talking to?

A. I don't remember exactly.

Q. When did you make the decision to terminate her?

A. I don't know exactly when.

Q. Was it that day?

A. Probably later on that day, yes.

Q. You went and talked to Mr. Ferrelli about this, correct?

A. No, I didn't go and talk to Mr. Ferelli about this.

Q. Did you ever go and tell Mr. Ferrelli that you were letting Ms. Deas go?

A. I did not go and tell Mr. Ferrelli, no.

* * * *

[29] Q. I want to know what now that you have, as a Social Security disabilities examiner, when it comes to seizures and disability?

A. Seizures are considered controlled when they are one or two a month, as you said.

Q. That they're controlled if you have one or two a month?

A. Yes, that's considered good control.

Q. Okay. And if you had somebody who had seizures that were in good control—

A. It depends on—

Q. May I finish please, Doctor.

A. I'm sorry.

Q. If somebody had one or two controlled seizures a month, would that have been okay for her to work in the unit?

A. Again, I feel that this is a job sensitive area, and in an area like we were working in, no, I do not think that people who have seizures on that unit would be a good idea.

Q. Even if they're controlled or not controlled, right?

A. Well there is good control, yes.

* * * *

[31] Q. Did you have access to her medical records?

A. I could have obtained them, I think, if I wanted them.

Q. Where were they?

A. Where were they?

Q. Um-hmm.

A. I don't know where they were.

Q. You didn't know where the medical records were for your employees?

A. They were in the unit that kept them.

Q. What unit kept them?

A. Down in the administrative area.

Q. Do you know where the records were kept, the medical records for your employees?

A. Specifically, they were in the administrative area. Now specifically what room, no. I don't know.

Q. Okay, so the medical records on your employees, you don't know where they were; is that correct?

A. Not specifically.

Q. Okay. And you wouldn't have reviewed her medical records?

A. I felt that having two seizures in the same day wouldn't have mattered. I felt it was a dangerous situation.

* * * *

[37] Q. Did you have—

A. Helps plan and participates in activities, field trips and outings. That's as close as it comes.

Q. Okay. Was it a requirement for addiction techs to drive patients?

A. We were getting to that point, yes.

Q. Was it a requirement when Allison was hired?

A. I felt it was, yes.

Q. And did you make sure that everybody had a driver's license if it was a requirement? Was that a requirement to have a driver's license?

A. I don't recall as making it part of the requirement, but we wanted people to know how to drive, yes.

Q. But it was not a requirement?

A. We were moving in that—

Q. Was it a requirement when Allison worked there?

A. Again, we were moving in that direction because—

Q. Doctor, was it a requirement when she worked there?

A. We were moving in that direction, yes.

Q. So is your answer, no, it was not a requirement at that point?

A. I cannot remember whether we specified that one had to drive at that point in time.

Q. And whose vehicle would that person drive, their [38] own or a company vehicle?

A. We did not have a company vehicle at that time.

Q. So were they required to drive their own cars?

A. That—at that point in time, we weren't transporting any patients at that time.

Q. Did you have relationships or an arrangement with a credit union for employees of AATC to become members of a credit union?

A. Not to my knowledge.

Q. Did you have any benefits for employees at all?

A. Yes.

Q. What benefits did they have?

A. I don't remember specifically. That would be under the program director.

Q. Who was the program director?

A. I don't know if Phil Smith was the one at that time or not. Phil Smith would have been the program director, as I recall.

Q. You don't know what benefits at all your employees had?

A. No, I didn't handle that.

Q. Okay. Did you take care of the orientation for Ms. Deas?

A. Part of it, yes.

* * * *

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

No. 95-353-B-A

ALLISON DEAS

versus

RIVER WEST, L.P.,
ALTERNATIVE ADDICTION TREATMENT CONCEPTS, INC.,
STROTHER P. LINDSEY-DIXON AND PEGGY JARREAU

EXCERPTS FROM THE DEPOSITION OF ALLISON DEAS TAKEN ON JULY 22, 1996

* * * *

[22] Q. All right. And perhaps when I used the term epilepsy, I equate that with seizures. Do you have a condition which causes you to have seizures?

A. Yes, sir.

Q. And what is that?

A. A lesion in my left brain. There is no technical term for it.

Q. Okay. And that has been diagnosed?

A. Yes, sir.

Q. Okay. Tell me when it was first diagnosed.

A. It was first explained to me in 1983.

Q. And who explained it to you?

A. Dr. Dyken, D-y-k-e-n. I don't remember his first name.

Q. Do you remember where he was?

A. Mobile, Alabama.

Q. And what did he tell you about it?

A. He just explained that I had a lesion in my left brain. I said, "What is a lesion?" And from my understanding, it was something like a couple of blood vessels in the left brain that are connected at one spot.

* * * *

[24] Q. At the time this was first diagnosed, am I correct in understanding you had had a seizure and that is how you came to see Dr. Dyken?

A. I had seen another neurologist before Dr. Dyken. But—and it was because I had had seizures. But they had never been able to diagnose what the reason was.

Q. Do you remember that doctor's name?

A. No, sir.

Q. All right. How often—do you presently experience seizure problems?

A. No, sir.

Q. When is the last time you had a seizure?

A. The beginning of April of this year.

Q. Can you describe for me what happens to you, if you know?

A. I am not really sure.

Q. Do you—I don't want to say lose consciousness, but do you not have any awareness of what has happened to you once it is over?

A. Sometimes I do. Sometimes I don't.

Q. What do you know about it?

A. I have been told by people that are around me whenever I have one or had one they are very short in length, as far as under ten seconds usually, and that [25] I just stand there with a blank look on my face.

Q. Over the course of that condition since you were diagnosed in 1983, has the frequency of those seizures changed, stayed the same, lessened, increased?

A. Yes.

Q. In what way?

A. When I was much younger, they were much more violent. I had grand mal seizures.

Q. All right.

A. Then it slowed down a lot for a few years, and then with my doctor going and changing my dosage, trying to figure out what the correct dosage would be to stop them all together, my frequency started to pick back up, but it was very—it was with very small seizures, like the trance-like ones.

Q. Okay. I am going to go back and ask you a few questions because you have given me a lot of information just now.

Different people understand different things by the term grand mal seizures. Can you tell me what you mean by that; how would you describe a grand mal seizure?

A. Convulsions, biting on the tongue really hard, lose a lot of blood in the tongue, and they would be much longer.

* * * *

UNITED STATES DISTRICT COURT
D. KANSAS

No. 92-1456-PFK

DELORES A. CASTORENA,
Plaintiff,
v.
MARVIN T. RUNYON, JR., Postmaster General, and WILLIAM F. JONES,
Defendants.

May 23, 1994

MEMORANDUM AND ORDER

PATRICK F. KELLY, District Judge.

This matter comes before the court on plaintiff Delores A. Castorena's motion for reconsideration and motion to reject defendant Marvin T. Runyon's response to said motion as untimely. The latter motion will be addressed first.

Timeliness of Response

A party opposing a motion for reconsideration has 10 days in which to file a response. D. Kan. Rule 206(b). Castorena filed her motion on April 14, 1994, and Runyon filed his response on April 29, 1994. Castorena contends that even if the time frame for a response allowed for a Sunday, Runyon's response was due April 25, 1994. Castorena's contention fails to take into account Fed. R. Civ. P. 6(a), which provides in pertinent part:

> In computing any period of time prescribed or allowed by these rules, by the local rules of any dis-

> trict court, by order of court, or by an applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. . . . When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

Therefore, in computing the 10-day period, counting begins with April 15. The weekends of April 16-17 and April 23-24 are excluded from the computation. Additionally, April 27 is excluded because President Clinton designated the day a legal holiday in observance of former President Nixon's funeral. Thus, this court agrees with the defendant that his response was not due until April 29, 1994. Runyon's response was filed timely.

The plaintiff recently filed a request to withdraw her motion to reject Runyon's response to her reconsideration motion. The request is granted.

Reconsideration

Castorena files her motion for reconsideration pursuant to D. Kan. Rule 206(f), which states: "A party may file a motion asking a judge . . . to reconsider an order or decision made by that judge. . . . Such motion shall be filed within ten days after the entry of the order or decision unless the time is extended by the court." *See Prudential Sec. Inc. v. LaPlant,* 151 F.R.D. 678, 679 (D. Kan. 1993) ("a motion to reconsider is purely a creature of local rule and is not covered by any provision of the Federal Rules of Civil Procedure"). In *Van Skiver v. United States,* 952 F.2d 1241, 1243 (10th Cir. 1991), *cert. denied,* 506 U.S. 828, 121 L.Ed.2d 51 (1992), the Tenth Circuit Court of Appeals discussed motions to reconsider, stating:

> The Federal Rules of Civil Procedure do not recognize a "motion to reconsider." Instead, the rules allow a litigant subject to an adverse judgment to

> file either a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e) or a motion seeking relief from the judgment pursuant to Fed. R. Civ. P. 60(b). These two rules are distinct; they serve different purposes and produce different consequences. Which rule applies to a motion depends essentially on the time a motion is served. If a motion is served within ten days of the rendition of judgment, the motion ordinarily will fall under Rule 59(e). If the motion is served after that time it falls under Rule 60(b).

(Citations omitted.)

Castorena's motion was filed within 10 days of the order.[1] Thus, it was filed timely under local rules. Additionally, for purposes of the federal rules, the plaintiff's motion would fall under Rule 59(e), a motion to alter or amend a judgment. *See Northern Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1155 (9th Cir. 1988) ("A motion for reconsideration of a summary judgment is appropriately brought under rule 59(e)."); *see also Koch v. Shell Oil Co.*, 1993 WL 393763, *1 (D. Kan. 1993). The standards applied to motions under D. Kan. Rule 206(f) or Fed. R. Civ. P. 59(e) are the same.

> It is the general rule that a motion to reconsider is the opportunity for the court to correct manifest errors of law or fact and to review newly discovered evidence. Appropriate circumstances for a motion to reconsider are where the court has obviously misapprehended a party's position, the facts or the law, or mistakenly has decided issues outside of those the parties presented for determination.

Foutty v. Equifax Services, Inc., 764 F.Supp. 621, 622 (D. Kan. 1991) (citations omitted); *see State of Kansas ex rel. Hayden v. United States*, 751 F.Supp. 1495, 1496 (D. Kan. 1990), *aff'd*, 953 F.2d 1392 (10th Cir. 1992);

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[1] The Memorandum and Order was filed April 4, 1994. Castorena filed her motion on April 14, 1994. See Fed. R. Civ. P. 6(a).

Renfro v. City of Emporia, Kan., 732 F.Supp. 1116, 1117 (D. Kan. 1990), *aff'd*, 948 F.2d 1529 (10th Cir. 1991); *see also Williams v. Boeing Military Aircraft Co., Inc.*, No. 88-1366, 1991 WL 97592, *1 (D. Kan. 1991). It is within the district court's discretion whether to grant a motion for reconsideration. *Hancock v. City of Oklahoma City*, 857 F.2d 1394, 1395 (10th Cir. 1988).

Castorena asks this court to reconsider its grant of summary judgment to the defendant. With regard to her discrimination claim based upon race/national origin, this court found the plaintiff failed to exhaust her administrative remedies. "The plaintiff's complaints concern the continuing effects of an alleged discriminatory action that existed before the relevant filing period." *Castorena v. Runyon, Postmaster General, & Jones*, No. 92-1456-PFK, slip op. at 11 (D. Kan. Apr. 4, 1994).

A brief review of the facts is helpful. Castorena worked for the United States Postal Service (USPS) in St. Louis, Missouri, from November 1968 until December 1971, at which time she resigned. She requested reinstatement several times, most recently in 1991 in Wichita, Kansas. The USPS in Wichita denied Castorena's request, relying in part upon an unfavorable termination evaluation by her former supervisor in St. Louis.

Castorena claims this court's ruling is manifestly unjust because the validity of her Title VII claim did not become apparent until 1991. She maintains that even though she was aware of her supervisor's alleged discriminatory treatment of her in 1971, she had no Title VII claim, and thus no basis upon which to commence administrative procedures, until 1991 when she learned of her former supervisor's negative termination evaluation and realized its impact upon her life.

The plaintiff is advancing the same arguments this court previously rejected. A motion to reconsider, under either D. Kan. Rule 206(f) or Fed. R. Civ. P. 59(e), does not

permit the losing litigant to rehash arguments previously addressed and rejected or to present new legal theories or facts that could have been raised earlier. *National Metal Finishing Co., Inc. v. Barclaysamerican/Commercial, Inc.*, 899 F.2d 119, 123 (1st Cir. 1990); *Comeau v. Rupp*, 810 F.Supp. 1172, 1175 (D. Kan. 1992); *Van Skiver v. United States*, 751 F.Supp. 1522, 1523 (D. Kan. 1990), *aff'd*, 952 F.2d 1241, 1243 (10th Cir. 1991), *cert. denied*, 506 U.S. 828, 121 L.Ed.2d 51 (1992); *Prudential Sec. Inc.*, 151 F.R.D. at 680.

Castorena also disagrees with this court's finding that equitable tolling was not warranted, claiming she had neither the capacity nor the information to invoke the administrative process prior to 1991. For support, she cites *Richardson v. Frank*, 975 F.2d 1433 (10th Cir. 1991), for the proposition that equitable tolling is sanctioned if the government misinforms the plaintiff about time limitations for pursuing administrative remedies. The plaintiff then asserts the USPS misled her by hiding the negative termination evaluation from her for almost 20 years.

Castorena's argument could have been raised earlier. Her argument also loses on the merits. The *Richardson* court stated the plaintiff must prove "he was misled and lulled into inaction despite his due diligence." 975 F.2d at 1437; *see Castorena*, slip op. at 11 (equitable tolling is appropriate if the employer actively deceives or misleads the employee or if the employer lulls the employee into inaction). The plaintiff is under the misapprehension the USPS was obligated to disclose the negative termination evaluation without a request for such information. There is no evidence the USPS hid the unfavorable termination evaluation from *Castorena*. There is no evidence the USPS misled the plaintiff, actively deceived her, or lulled her into inactivity in spite of her due diligence. In fact, the plaintiff does not allege she ever requested the evaluation. A mere allegation that the USPS hid the evaluation from her is not sufficient. *See Anderson v. Liberty Lobby,*

Inc., 477 U.S. 242, 256 (1986) ("a party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial"). Equitable tolling is not warranted on the facts before this court.

Castorena also asks this court to reconsider its grant of summary judgment to the defendant with regard to her discrimination claim based upon disability, previously referred to as handicap. She claims this court grossly misapplied the law in requiring that she show her impairment had a substantial limitation upon one or more major life activities. In addition, the plaintiff claims for the first time that her mental impairment substantially limits her major life activities. Although not required to do so, this court will address the merits of her claims.

In this court's previous memorandum and order, the definition of disability was discussed:

> The [Rehabilitation] Act defines "individual with a disability" as "any individual who . . . has a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment." 29 U.S.C. § 706(8)(A) (1994 Supp.). The Code of Federal Regulations further explains: (a) Handicapped person is defined . . . as one who: (1) Has a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment.
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> 29 C.F.R. § 1613.702.

Castorena, slip op. at 14-15. This court relied upon the Tenth Circuit Court of Appeals' construction of the statutory and regulatory framework: " 'The definition of a handicapped [disabled] person has two elements: first,

that one has, has a record of having, or is regarded as having a physical or mental impairment; and second, that that impairment substantially limits one or more major life activities.'" *Id.* at 15 (quoting *Welsh v. City of Tulsa, Okla.*, 977 F.2d 1415, 1417 (10th Cir. 1992)).

The plaintiff previously argued the definition of disability has three alternative prongs—impairment, record of, or regarded as—rather than the *Welsh* two-part test in which both parts must be satisfied. She again maintains that if an individual has a record of impairment or is regarded as having an impairment, the individual need not establish the impairment substantially limits major life activities. In her motion for reconsideration, for the first time, she cites case law in support of her argument. She contends *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), and *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987), do not require a plaintiff to establish her impairment substantially limits major life activities. In other words, *Castorena* asserts these cases stand for the proposition that as long as the plaintiff has a record of impairment or is regarded as impaired, the plaintiff does not need to show her impairment at present substantially limits major life activities in order to qualify as disabled under the Rehabilitation Act.

Castorena directs this court's attention to the statement in *Davis* that "[a] person who has a record of or is regarded as having an impairment may at present have no actual incapacity at all." 442 U.S. at 405-06 n. 6. The plaintiff also points out the *Arline* Court noted that "Congress expanded the definition of 'handicapped individual' so as to preclude discrimination against '[a] person who has a record of, or is regarded as having, an impairment [but who] may at present have no actual incapacity at all.'" 480 U.S. at 279 (quoting *Davis*, 442 U.S. at 405-06 n. 6). In a footnote, the Court explained the disability definition protects

> those persons who do not in fact have the condition which they are perceived as having, as well as those

> persons whose mental or physical condition does not substantially limit their life activities and who thus are not technically within clause (A) in the new definition. Members of both of these groups may be subjected to discrimination on the basis of their being regarded as handicapped.

Id. at 279 n. 4.

The thrust of the *Davis* case was whether the plaintiff was an "otherwise qualified" disabled individual. The question of whether the disability substantially limited the plaintiff's major life activities was not before the Court. Based upon the plaintiff's serious hearing impairment, Southeastern Community College (Southeastern) refused to admit the plaintiff in its nursing program. The plaintiff filed suit in federal court, alleging a violation of the Rehabilitation Act. The district court entered judgment for Southeastern, finding the plaintiff was not an "otherwise qualified" disabled individual because her disability prevented her from performing safely in the nursing program and in the nursing profession. The Fourth Circuit Court of Appeals reversed, concluding the district court should not have considered the plaintiff's disability in deciding if she was "otherwise qualified" for the nursing program. The court of appeals ordered Southeastern to reexamine the plaintiff's admission application without considering her hearing disability.

The Supreme Court reversed, reasoning that educational institutions are not compelled under the Rehabilitation Act to overlook an individual's disability or to make substantial alterations that allow participation of a disabled individual in federally funded programs. Rather, the Act only requires "that an 'otherwise qualified handicapped individual' not be excluded from participation in a federally funded program 'solely by reason of his handicap,' indicating only that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context." 442 U.S. at 405.

In a footnote following the above quote, the footnote to which Castorena cites, the Court detailed the definition of disability. Following the quote upon which the plaintiff relies, "[a] person who has a record of or is regarded as having an impairment may at present have no actual incapacity at all," the Court stated: "Such a person would be exactly the kind of individual who could be 'otherwise qualified' to participate in covered programs. And a person who suffers from a limiting physical or mental impairment still may possess other abilities that permit him to meet the requirements of various programs." 442 U.S. at 405-06 n. 6.

The Arline Court addressed whether an individual with a contagious disease such as tuberculosis was disabled for purposes of the Rehabilitation Act, and if so, whether this disabled individual was "otherwise qualified" to be an elementary school teacher. The Arline plaintiff was released from her teaching position after suffering three tuberculosis-related relapses within 24 months. She brought suit in federal court under the Rehabilitation Act. The district court found the plaintiff was disabled, but concluded Congress could not have intended for contagious diseases to be included within the disability definition. The Eleventh Circuit Court of Appeals reversed, holding the Rehabilitation Act does not preclude coverage for individuals with contagious diseases. The court of appeals remanded the case, ordering further findings concerning whether the contagiousness of tuberculosis disqualified the plaintiff from being "otherwise qualified" and whether it was possible to make reasonable accommodation for her.

The Supreme Court affirmed. The Court discussed the amended definition of disability, including the quote upon which Castorena relies, but that quote must be read in context of the entire case. Following that quote, the Court began its analysis by noting the definitions of "physical impairment" and "major life activities" found in the Code of Federal Regulations (C.F.R.) are significant in determining if an individual is disabled.

Castorena claims the Supreme Court never analyzed whether the Arline plaintiff's impairment affected her ability to walk, see, hear, speak, breath, learning, or work—the definition of major life activities set forth in C.F.R. See 29 C.F.R. § 1613.702(c) (1993) ("Major life activities means functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."). Although the Arline Court did not analyze the matter in depth, the Court concluded the plaintiff's prior hospitalization for her physical impairment established substantial limitation of her major life activities.

The Supreme Court then discussed contagiousness, concluding "[i]t would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment." 480 U.S. at 282. The Court reasoned:

> Nothing in the legislative history . . . suggests that Congress intended such a result. That history demonstrates that Congress was as concerned about the effect of an impairment on others as it was about its effect on the individual. Congress extended coverage . . . to those individuals who are simply "regarded as having" a physical or mental impairment. The Senate Report provides as an example of a person who would be covered under this subsection "a person with some kind of visible physical impairment which in fact does not substantially limit that person's functioning." S. Rep. No. 93-1297, p. 64 (1974). Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment.
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> . . . By amending the definition of "handicapped individual" to include not only those who are actually

> physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.

Id. at 282-84. In a footnote, the Court further explained that "Congress plainly intended the Act to cover persons with a physical or mental impairment (whether actual, past, or perceived) that substantially limited one's ability to work." *Id.* at 283 n. 10.

This court does not agree with Castorena that Davis and Arline eliminate "substantial limitation of major life activities" as a requisite element of the disability definition in all situations.[2] The Code suports this court's position, providing:

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[2] Castorena also claims two opinions this court issued follow her interpretation of the disability definition set forth in *Davis* and *Arline*. In *Wallace v. Veterans Admin.*, 683 F.Supp. 758 (D. Kan. 1988), the plaintiff, a registered nurse, filed suit under the Rehabilitation Act after a VA hospital refused to hire her because she was a recovering drug addict. Castorena contends there are similarities between the *Wallace* plaintiff and herself. Castorena maintains the *Wallace* plaintiff, although drug-free for over nine months, "might be at risk of recurring drug addiction around narcotics." (Pltf.'s Memo, at 10.) Castorena also speculates the *Wallace* plaintiff's major life activities were not limited substantially by her addiction.) According to Castorena, she too is "at risk of bizarre behavior, without her medications and without the ongoing treatment." (Pltf.'s Memo., at 10.) Castorena's cites to the record do not support this statement. Although the letters from her social worker and psychiatrist attest to the fact she is taking psychotropic drugs and receiving counseling, the letters do not discuss what her condition would be without medication or counseling. Castorena's own deposition testimony was that she was told a couple of years before filing suit that her condition no longer necessitated medication or counseling.

In *Wallace*, which was decided before the Tenth Circuit's *Welsh* decision, this court stated without discussion that drug and alcohol

> (d) Has a record of such an impairment means has a history of, or has been classified (or misclassified) as having a mental or physical impairment that substantially limits one or more major life activities.
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> (e) Is regarded as having such an impairment means (1) has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer as constituting such a limitation; (2) has a physical or mental impairment that substantially liimits major life activities only as a result of the attitude of an employer toward such impairment; (3) or has none of the impairments defined in paragraph (b) of this section but is treated by an employer as having such an impairment.

29 C.F.R. § 1613.702 (1993)

As set forth in this court's previous memorandum and order, the defendant "acknowledges Castorena has established some record of impairment if the facts are viewed in her favor." *Castorena*, slip op. at 15. The plaintiff's own deposition testimony stated such impairment did not

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addiction are statutorily defined disabilities. 683 F.Supp. at 761. The issue before the court was not whether the plaintiff had an impairment and whether that impairment had to limit substantially major life activities, but whether the plaintiff was "otherwise qualified" for the position. *Wallace* does not offer guidance for the instant case.

In *Nicely v. Rice*, No. 92-1240, 1992 WL 403091, *2-3 (D. Kan. Dec. 7, 1992), aff'd, 1 F.3d 1249 (10th Cir. 1993), the plaintiff's impairment was a partially fused right wrist and a fused right elbow. This court accepted that the plaintiff's impairment substantially limited his major life activites because his impairment precluded him from accomplishing daily hygienic functions. Castorena complains "[t]his relatively modest impairment does not 'hold a candle' to [her] psychiatric history, her repeated hospitalizations, and her occasional inability to care for her children, as well as continued dependence on psychiatric care and related drugs." (Pltf.'s Memo., at 12.) Castorena is comparing apples and oranges. Additionally, this court in *Nicely* cited and relied upon the *Welsh* court's two-element disability definition.

impede her ability to walk, see, hear, speak, breath, and learn or to care for herself and her children. Castorena insists this court should assume her impairment substantially limits her major life activities based upon her prior hospitalizations because, according to the plaintiff, the *Arline* Court held "a single hospitalization more than twenty years before was 'a fact more than sufficient to establish that one or more . . . major life activities were substantially limited. . . .'" (Pltf.'s Reply, at 4 (quoting *Arline*, 480 U.S. at 281)). Castorena's reading of *Arline* overlooks the Court's explanation that "Arline suffered tuberculosis 'in an acute form in such a degree that it affected her respiratory system,' and was hospitalized for this condition." 480 U.S. at 281. Furthermore, who qualifies as an disabled individual under the Rehabilitation Act is determined "on a case-by-case basis." *Welsh*, 977 F.2d at 1417. Castorena also argues this court should infer her schizophrenia substantially limits her major life activities based upon her being diagnosed as paranoid schizophrenic and upon having her children taken away from her in the past. Such an inference would entail ignoring the plaintiff's deposition testimony to the contrary. Pursuant to 29 C.F.R. § 613.702(d), the fact Castorena may have a record of an impairment does not bring her within the disability definition of the Rehabilitation Act because she has failed to establish her impairment substantially limits major life activities.

If this court should follow literally the definition of perceived impairment found at 29 C.F.R. § 1613.702(e), it is not clear which clause Castorena believes is appropriate for her situation. The plaintiff's arguments are general. In her response to Runyon's motion for summary judgment, Castorena cites to the entire definition of perceived impairment, but does not specify a particular clause, for her contention that the "USPS' unwillingness to proceed 'to take any chances' with [her] shows that the deciding officials don't trust her statements [even from mental health professionals] and are also 'regarding her' as men-

tally or emotionally impaired whether she is or not." (Pltf.'s Resp. to Defs.' Mtn. to Dism. or for Summ. Judg., at 28.) In the conclusion of her motion for reconsideration, the plaintiff maintains that "because USPS knew about her nervous breakdowns and paranoid schizophrenia, then [she] was 'regarded' as disabled." (Pltf.'s Memo., at 15.) In her reply to Runyon's response to her reconsideration motion, Castorena again argues the USPS regarded her as disabled because they knew about her history of emotional illness. (Pltf.'s Reply, at 9.)

This court questions the appropriateness of a literal adherence to 29 C.F.R. § 1613.702(e) because *Welsh*, the opinion in which the Tenth Circuit set forth its definition of disability upon which this court relied, involved a perceived impairment question. The *Welsh* plaintiff argued he had been denied employment as a firefighter because the City of Tulsa regarded him as having an impairment that substantially limited his ability to work as a firefighter. The Tenth Circuit was well aware of the definition of "regarded as having an impairment" found in C.F.R., having cited the definition two paragraphs prior to setting forth the court's definition of disability.[3] 977 F.2d at 1417. Even if this court disagreed with the *Welsh* court's construction of the statutory and regulatory framework for defining disability, this court is bound by Tenth Cir-

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[3] The regulations to which the *Welsh* court refers are found at 45 C.F.R. § 84.3(j) (Department of Health and Human Services; Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving Federal Financial Assistance), which uses almost identical language as found at 29 C.F.R. § 1613.702 (Equal Employment Opportunity in the Federal Government; Prohibition Against Discrimination Because of a Physical or Mental Handicap). *Welsh* was a case involving § 504 of the Rehabilitation Act, 29 U.S.C. § 794, and the regulations at 45 C.F.R. § 84 only construe § 504. This case involves § 501 of the Rehabilitation Act, 29 U.S.C. 791. Castorena agrees §§ 501 and 504 of the Rehabilitation Act "share a common definition of 'disability' for coverage purposes." (Pltf.'s Reply, at 4.)

cuit precedent. This court previously followed the *Welsh* two-element test for defining disability under the Rehabilitation Act in *Nicely*, No. 92-1240, 1992 WL 403091 at *2-3 (D. Kan. Dec. 7, 1992), *aff'd*, 1 F.3d 1249 (10th Cir. 1993). The Western District of Oklahoma also has heeded the *Welsh* two-element disability definition. *Bolton v. Scrivner, Inc.*, 836 F.Supp. 783, 787 (W.D. Okla. 1993).

Additionally, the plaintiff contends this court should give deference to the bench decision for the Equal Employment Opportunity Commission (EEOC) hearing. The administrative law judge concluded:

> While there is some question as to whether Complainant's diagnosed paranoid schizophrenia was shown to have sufficiently impaired a major life function to qualify as a handicap under the law, I am willing to assume that she meets the definition for a handicap and the Agency does not contend otherwise.

(Defs.' Mtn. to Dism. or for Summ. Judg., Ex. N at 6.) As the plaintiff notes, the defendant now contends otherwise. Runyon responds, explaining that postal employees conduct the EEOC hearing sans legal guidance. Runyon also points out Castorena's deposition, in which the essence of her testimony was that her impairment had no substantial limitation upon her major life activities, was taken after the EEOC hearing.

This court remains mindful of the social purpose behind the Rehabilitation Act. *See Wallace*, 683 F.Supp. at 760-61. The fact the Act is to be construed liberally does not mean plaintiffs need not satisfy the elements for bringing a claim under the Act.

There is no gross error in this court's application of the law of disability.

Plaintiff Castorena's motion for reconsideration is denied.

IT IS ACCORDINGLY ORDERED this 23rd day of May, 1994, that plaintiff Castorena's motion for reconsideration (Dkt. No. 20) is denied, and her motion to reject defendant's response to said motion as untimely (Dkt. No. 22) is withdrawn.